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SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

In the matter of:

Violation Report/Complaint for the
Imposition of Administrative Penalties

Enforcement Investigation No: ER2016.17

STATEMENT OF DEFENSE OF THE
SONOMA MARIN AREA RAIL TRANSIT
DISTRICT

I. INTRODUCTION

SMART submits this Statement of Defense¹ in response to the September 5, 2017 violation report ("Report"). SMART has reviewed the allegations set forth in the Report and respectfully submits that BCDC's imposition of an administrative civil penalty in the amount of \$30,000.00 against SMART is neither authorized nor warranted under the McAteer-Petris Act ("Act").

The record demonstrates that SMART has not violated any provision of Section 66632 of the Act. In fact, BCDC does not allege that SMART violated the Act. Rather, the Report provides evidence that the alleged violation was caused solely by the act of a third-party easement holder conducting repair and maintenance activities related to its freight operations. SMART was added as a party on the sole basis that "it owns the property."

¹ SMART counsel and BCDC counsel /staff consulted regarding the violation report. BCDC staff "found merit" in SMART's contentions. Nonetheless, BCDC staff required SMART to file this Statement of Defense. (Attachment 1).

1 The Act does not empower the Commission to impose an administrative penalty
2 against an innocent property owner based solely on mere ownership status. BCDC staff's
3 request to expand the Commission's statutory penalty authority to include innocent property
4 owners should be rejected by the Commission absent specific enabling legislation.

5 Accordingly, SMART respectfully requests that the Commission dismiss SMART
6 as a party to this enforcement action seeking to impose an administrative penalty against it.

7
8 **II. FACTS OR ALLEGATIONS CONTAINED IN THE REPORT THAT**
9 **SMART ADMITS**

10 SMART admits the following allegations set forth in the Report:

- 11 A. Admits that Enforcement File No. ER 2016.17 is a relevant file.
- 12 C. Admits that Hunters Club Road pre-existed the enactment of the McAteer-
13 Petris Act.
- 14 D. Admits that NCRA was formed in 1989.
- 15 E. Admits that NWPRA was established in 1995.
- 16 F. Admits the allegations contained in paragraph F.
- 17 G. Admits the allegations contained in paragraph G.
- 18 H. Admits the allegations contained in paragraph H.
- 19 I. Admits the allegations contained in paragraph I.
- 20 J. Admits the allegations contained in paragraph K.
- 21 K. Admits the allegations contained in paragraph J.
- 22 L. Admits the allegations contained in paragraph K.
- 23 M. Admits the allegations contained in paragraph L.
- 24 O. Admits that Ms. Klein spoke to Gregg Jennings at SMART about the
25 unauthorized work subject to this Report.
- 26 P. Admits the allegations contained in paragraph P.
- 27 Q. Admits the allegations contained in paragraph Q.
- 28 R. Admits the allegations contained in paragraph R.
- S. Admits the allegations contained in paragraph K.
- X. Admits the allegations contained in paragraph X.

III. FACTS OR ALLEGATIONS CONTAINED IN THE REPORT THAT SMART DENIES

SMART generally denies that it violated Section 66632 of the McAteer-Petris Act and specifically denies the following allegations set forth in the Report:

A. Except as admitted above, denies all allegations contained in paragraph A.

C. Except as admitted above, denies all allegations contained in paragraph C.

W. Denies the allegation that SMART “add[ed] gravel to the road once a year to replace eroded material” as alleged in paragraph W.

IV. FACTS OR ALLEGATIONS CONTAINED IN THE REPORT FOR WHICH SMART HAS NO PERSONAL KNOWLEDGE.

SMART lacks sufficient knowledge to enable it to respond to the following allegations set forth in the Report and therefore denies those allegations:

1. Paragraphs B, M, N, O (except as denied above), T, U, V, W (except as denied above), Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, and MM.

V. OTHER FACTS WHICH EXONERATE SMART

The North Coast Railroad Authority ("NCRA") was formed in 1989 for the purpose of saving the old Northwestern Pacific Railroad freight corridor from abandonment (Report, paragraph D). The old railroad corridor generally extended from Lombard Station in Napa County to Eureka (Attachment 2). In 1995, NCRA, the Golden Gate Bridge, Highway, and Transportation District and the County of Marin formed a joint powers authority ("NWPRA") to preserve the railroad corridor (Report, Paragraph E). In 1996, NWPRA acquired the Lombard segment (site of the alleged violation) from Southern Pacific Railroad Line ("SP") subject to SP's long-term lease with California Northern Railroad Company ("CNRR") to provide freight service over the line (Attachment 2). At the same time, NWPRA, a noncarrier holder of the underlying real estate, granted a permanent freight easement to NCRA allowing it to continue freight service over the line should CNRR discontinue freight operations (Attachment 3). The CNRR lease was terminated in 1996 and NCRA took over freight service on the Lombard

1 segment by virtue of both its freight easement and a 1996 Operating Agreement with NWPRA
2 (Attachment 4). Since 1996, NCRA has maintained the Lombard segment for its freight
3 operation.

4 SMART was formed in 2002 to establish a passenger rail service in Sonoma and Marin
5 Counties to operate in harmony with the existing NCRA freight service (Attachment 5). In
6 2003, the underlying ownership of the Lombard segment (including the site identified in the
7 Report) was transferred by NWPRA to SMART (Report, Paragraph H). In 2011, SMART and
8 NCRA entered into an Operating and Coordination Agreement which: (1) acknowledged
9 NCRA's existing freight easement; (2) recognized the Northwestern Pacific Railroad Company
10 ("NWPCo") as NCRA's designated freight operator; and (3) confirmed NCRA's management,
11 inspection and maintenance authority/responsibilities over the Lombard segment (Attachment
12 6). Accordingly, SMART's underlying ownership has always been subject to NCRA's
13 statutory, deeded and contractual authority to operate, maintain and repair the Lombard
14 segment for freight operation purposes (Attachment 6). Significantly, the Lombard segment is
15 not part of the SMART/NCRA shared track, is used exclusively by NCRA for its freight
16 operations and is not used for SMART's passenger service operations.

17 The Report shows that upon inquiry from BCDC Chief of Enforcement, Adrienne Klein,
18 SMART immediately explained that any work conducted in that area was done by NCRA as
19 authorized under both its freight easement and operating agreement (Report, Paragraph O).
20 SMART also questioned whether BCDC jurisdiction was preempted under federal law.
21 Subsequent to consultation, Ms. Klein responded that BCDC Chief Counsel affirmed that
22 "NCRA is required to seek and obtain a BCDC permit for all work in BCDC's jurisdiction."
23 (Report, Paragraph Q).²

24 The Report contains evidence that NCRA admitted that NWPCo conducted the work as
25 part of its freight operations (Report, Paragraph T) but contains no allegation that SMART had
26 prior knowledge of the alleged violation.

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² Should the Commission not dismiss SMART as requested herein, SMART reserves the right to assert that BCDC
jurisdiction is preempted under federal law.

1 Since May, 2016, the Report demonstrates BCDC's attempts, apparently
2 unsuccessfully, to gain compliance solely from NCRA to remedy the alleged violation.
3 (Report, Paragraphs S, V, U, Y, Z, AA-KK, MM).

4 The Report claims that SMART is an entity "responsible for the violation" on the sole
5 basis that "it owns the subject property where the unauthorized work occurred." (Report,
6 Section IX).

7 It is undisputed that SMART did not place the fill or otherwise violate the Act. The
8 responsible party has been identified by BCDC. In fact, the responsible party has had
9 multiple communications with BCDC acknowledging its involvement (Report Paragraph T).
10 Under these circumstances, absent preemption, BCDC has the ability to enforce the Act
11 against the known actor. Given that SMART (1) did not commit the alleged violation; (2) did
12 not authorize the alleged violation; (3) had no knowledge of the alleged violation until notice
13 by BCDC; and (4) the admitted actor is known to BCDC it is respectfully submitted that
14 SMART is not a proper party to this enforcement proceeding seeking an administrative
15 penalty.

16
17 **VI. THE PROPOSED PENALTY AGAINST SMART DOES NOT APPROPRIATELY**
18 **CONSIDER THE STATUTORY FACTORS**

19 When imposing a penalty, BCDC must consider the following factors:

20 In determining the amount of administrative civil liability, the
21 commission shall take into consideration the nature, circumstance,
22 extent, and gravity of the violation or violations, whether the
23 violation is susceptible to removal or resolution, the cost to the state
24 in pursuing the enforcement action, and with respect to the violator,
25 the ability to pay, the effect on ability to continue in business, any
26 voluntary removal or resolution efforts undertaken, any prior history
of violations, the degree of culpability, economic savings, if any,
resulting from the violation, and such other matters as justice may
require (Gov. Code §66641.9)

27 Consideration of the nature, circumstances, and extent of the alleged violation reveals
28 that SMART should not be subject to any administrative penalty.

1 The alleged violation was neither committed, nor authorized, by SMART. The work was
2 done by a third party who had the legal authority to repair and maintain the area for its freight
3 operations. The alleged violation was done solely to enhance freight operations and provided
4 no benefit to SMART's passenger operations.

5 The Report does not allege that SMART has "any prior history of violations."

6 SMART has no degree of culpability. It did not commit the alleged violation and
7 cooperated immediately with BCDC staff upon notification of the alleged violation.

8 Considering the foregoing, it is submitted that no fine should be imposed against
9 SMART pursuant to the statutory factors set forth in Govt. Code section 66641.9.

11 VII. CONCLUSION

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13 In consideration of all the facts and circumstances, SMART requests that it be
14 dismissed from this proceeding. SMART did not violate any provision of the Act. Accordingly,
15 the Commission lacks jurisdiction under the Act to impose a fine against SMART. BCDC,
16 absent preemption, has the authority to both enforce the Act against the known actor and to
17 remedy the alleged fill violation without SMART's participation as a party to this enforcement
18 proceeding.

20 VIII. DOCUMENTS, EXHIBITS, OTHER MATERIALS TO SUPPORT SMART'S 21 ANSWERS OR THAT SMART WANTS TO BE MADE PART OF THE ADMINISTRATIVE 22 RECORD FOR THIS ENFORCEMENT PROCEEDING.

- 23 1. September 14, 2017 email from John Bowers to Tom Lyons
- 24 2. STB Finance Docket No. 32910
- 25 3. Grant of Easement NCRA Freight
- 26 4. 1996 Cooperative Agreement between NCRA and NWPRA
- 27 5. Public Utilities Code Section 105001
- 28 6. 2011 Operating and Coordination Agreement between SMART and NCRA

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1 IX. NAME OF ANY PERSON WHOSE DECLARATION UNDER PENALTY OF PERJURY
2 WAS LISTED IN THE VIOLATION REPORT AS BEING PART OF THE STAFF'S CASE
3 WHO SMART WANTS TO CROSS-EXAMINE, ALL DOCUMENTS ABOUT WHICH YOU
4 WANT TO CROSS-EXAMINE THE PERSON AREA OR AREAS OF INFORMATION
5 ABOUT WHICH THE RESPONDENT WANTS TO CROSS-EXAMINE THE WITNESS,
6 INFORMATION THAT THE RESPONDENT HOPES TO ELICIT IN CROSS-EXAMINATION,
7 AND THE REASON(S) WHY SOME OTHER METHOD OF PROVING THIS INFORMATION
8 IS UNSATISFACTORY:

9 SMART wishes to preserve the right to cross-examine BCDC Chief of Enforcement,
10 Adrienne Klein, regarding all correspondence, documents and conversations related to this
11 enforcement action for which she has personal knowledge of. The purpose of cross-
12 examination is to dispute the allegations that SMART violated the Act or was otherwise
13 culpable for the violation alleged.

14 SMART wishes to preserve the right to cross-examine the unidentified "two local
15 residents" who allegedly orally advised Ms. Klein that "SMART would add gravel to the road
16 once a year to replace eroded material." SMART denies that it has done any such work and
17 believes the witnesses have misidentified the responsible party. The purpose of cross-
18 examination is to contest the veracity and credibility of these anonymous witnesses.
19 Moreover, SMART asserts that due process requires that these alleged witnesses providing
20 uncorroborated hearsay be both identified and SMART be given the opportunity to cross-
21 exam them. SMART will withdraw this request should BCDC strike this mistaken and
22 uncorroborated hearsay from the report.

23 Dated this 5 day of October, 2017

24 THOMAS F. LYONS
25 GENERAL COUNSEL

26 By: 

27 Thomas F. Lyons
28 Sonoma-Marin Area
Rail Transit

Statement of Defense Form

Enforcement Investigation ER2016.017

North Coast Rail Authority (NCRA) and Sonoma-Marin Area Rail Transit District (SMART)

FAILURE (1) TO COMPLETE THIS FORM, (2) TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLARATIONS UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF'S CASE AS IDENTIFIED IN THE VIOLATION REPORT THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FORM AND ALL INCLUDED MATERIALS TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF OR TO CONTACT **MATTHEW TRUJILLO** OR **JOHN BOWERS** OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF BY OCTOBER 10, 2017 MEANS THAT THE COMMISSION CAN REFUSE TO CONSIDER SUCH STATEMENTS AND EVIDENCE WHEN THE COMMISSION HEARS THIS MATTER.

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU, IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report. The violation report indicates that you may be responsible for or in some way involved in either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. This form also requires you to identify by name any person whom you may want to cross-examine prior to the enforcement hearing on this matter, the area of knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, i.e., no issuance of either a cease or desist order or a permit revocation order, this form allows you alternatively to pay the proposed fine without contesting the matter subject to ratification of the amount by the Commission.

IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE STAFF HAS RELIED IN THE VIOLATION REPORT, YOU MUST COMPLETE PARAGRAPH SEVEN TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, (2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY YOU BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.

You should complete the form as fully and accurately as you can as quickly as you can and return it no later than 35 days after its having been mailed to you to the Commission's enforcement staff at the address:

**San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, California 94102**

If you believe that you have good cause for not being able to complete this form within 35 days of its having been mailed, please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise complete the form as much as is currently possible will be grant an extension to complete the form.

If the staff violation report/complaint that accompanied this statement of defense form included a proposed civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed penalty along with a notation that you are choosing to pay the penalty rather than contesting it on an administrative permit listing. If no Commissioner objects to the amount of the penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the proposed payment of the penalty, the Commission shall determine by a majority of those present and voting whether to let the proposed penalty stand. If such a majority votes to let the proposed penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority does not let the proposed penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's action. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact as soon as possible **MATTHEW TRUJILLO** or **JOHN BOWERS** of the Commission Enforcement Staff at telephone number **415-352-3600**.

1. Facts or allegations contained in the violation report that you admit (with specific reference to the paragraph number in the violation report):

See Attached

2. Facts or allegations contained in the violation report that you deny (with specific reference to paragraph number in the violation report):

See Attached

3. Facts or allegations contained in the violation report of which you have no personal knowledge (with specific reference to paragraph number in the violation report):

See Attached

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify it by name, date, type, and any other identifying information and provide the original or a copy if you can):

See Attached

5. Any other information, statement, etc. that you want to make:

See Attached

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, title and enclose a copy with this completed form):

See Attached

7. Name of any person whose declaration under penalty of perjury was listed in the violation report as being part of the staff's case who the respondent wants to cross-examine, all documents about which you want to cross-examine the person, area or areas of information about which the respondent wants to cross-examine the witness, information that the respondent hopes to elicit in cross-examination, and the reason(s) why some other method of proving this information is unsatisfactory:

See Attached

ATTACHMENT “1”

Jim Flageollet

From: Bowers, John@BCDC <John.Bowers@bcdcc.ca.gov>
Sent: Thursday, September 14, 2017 4:47 PM
To: Jim Flageollet
Subject: Re: Violation Report for BCDC Enforcement File No. ER2016.017

From: "Bowers, John@BCDC" <John.Bowers@bcdcc.ca.gov>
Date: Thursday, September 14, 2017 at 4:43 PM
To: "tlyons@sonomamarintrain.org" <tlyons@sonomamarintrain.org>, "jflagollet@sonomamarintrain.org" <jflagollet@sonomamarintrain.org>
Cc: "Klein, Adrienne@BCDC" <adrienne.klein@bcdcc.ca.gov>, "Trujillo, Matthew@BCDC" <Matthew.Trujillo@bcdcc.ca.gov>, "Zeppetello, Marc@BCDC" <marc.zeppetello@bcdcc.ca.gov>
Subject: Violation Report for BCDC Enforcement File No. ER2016.017

Dear Tom and Jim,

Thank you for your interest in facilitating a resolution of the above-referenced violation proceeding, as reflected in your initiating and participating in yesterday's conference call.

Specifically, we appreciate the willingness of SMART, as expressed in the course of our call, to undertake through discussions with the NCRA to negotiate a resolution of the violation described in the Violation Report (VR). We understand that such discussions will occur pursuant to relevant and applicable terms of the "Operating and Coordination Agreement for the Northwestern Pacific Line," dated June 23, 2011, between SMART and the NCRA ("Agreement"). In this regard I would like to point out that we regard the circumstances described in the VR to constitute both a "nuisance," as that term is used in Section 8.02 of the Agreement, and thus a violation of that provision, as well as a violation of Section 16.05 of the Agreement, which requires both parties to the Agreement to "comply with all Applicable Laws on the Subject Segments." Exhibit 1 to the Agreement defines the term "Applicable Laws" to mean "all federal, state, and local laws, rules, regulations, directives, orders and judgments applicable to the Subject Segments, regardless of scope." We regard the McAteer-Petris Act as clearly falling within the scope of this definition.

In the course of our call you advanced the position that, under the terms of the Agreement, specifically sections 2.02 and 4.02 thereof, and notwithstanding SMART's status as owner of the land on which the actions described in the VR occurred, as between SMART and the NCRA the NCRA is exclusively and solely responsible for such actions. We find merit in this contention. However, before we decide to give it dispositive effect we would like to see this argument, or defense, in writing. Moreover, unless and until either the Executive Director or the Enforcement Committee sees fit to dismiss SMART from this enforcement proceeding, SMART is subject to the procedural requirements that govern such proceedings (a copy of which we provided to you along with the VR). Accordingly, please provide us with your defense together with a description of the legal and factual basis for it in the form of the statement of defense that is required by section 11322 and Appendix I of the Commission's administrative regulations.

In articulating your defense we would like you to address the following question: What is the significance, if any, to the allocation of responsibility as between SMART, as landowner, and the NCRA, as holder of an easement from SMART or its predecessor, for the remediation of the consequences of the actions described in the VR, of the automation through the installation of remote activation equipment at the Black Point Swing Bridge and the associated vacation and/or abandonment of the residence previously occupied by the operator of the swing bridge and the road

that provides access to it (the site of the actions described in the VR)? In other words, does the fact that the above-described residence and the road that provides access to it no longer bear any relationship to the operation of rail traffic over the Lombard Segment have any bearing on the allocation of responsibility under the Agreement for remediating the consequences of the actions described in the VR?

Please feel free to contact me (415-352-3610) if you have any questions or would like to discuss these matters further. Thank you for your continued cooperation.

John Bowers

CONFIDENTIALITY NOTICE: This message, together with any attachments, is intended only for the use of the individual or entity to whom it is addressed and may contain information that is confidential and/or privileged and prohibited from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender immediately by telephone or by return e-mail and delete this message along with any attachments.

ATTACHMENT “2”

Federal Transit Administration

Transfer of Federally Assisted Land or Facility

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of intent to transfer Federally assisted land or facility.

SUMMARY: 49 U.S.C. Section 5334(g), [formerly called Section 12(k) of The Federal Transit Act], permits the Administrator of the Federal Transit Administration (FTA) to authorize a recipient of FTA funds to transfer land or a facility to a public body for any public purpose with no further obligation to the Federal Government if, among other things, no Federal agency is interested in acquiring the asset for Federal use. Accordingly, FTA is issuing this Notice to advise Federal agencies that the Maryland Mass Transit Administration intends to transfer property located at the intersection of York Road, Dulaney Valley Road, Joppa Road and Allegheny Avenue, in Towson, Maryland.

EFFECTIVE DATE: Any Federal agency interested in acquiring the land or facility must notify the FTA Philadelphia Regional Office of its interest, by June 17, 1996.

ADDRESSES: Interested parties should notify the Regional Office by writing to Mr. Sheldon A. Kinbar, Regional Administrator, Federal Transit Administration, 1760 Market Street, Room 500, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Sheila Byrne, Transportation Program Specialist, Region 3, at 215/656-6900 or Ann Catlin, Real Estate Specialist, Office of Program Management at 202/366-1647.

SUPPLEMENTARY INFORMATION:

Background

49 U.S.C. Section 5334(g) provides guidance on the transfer of capital assets. Specifically, if a recipient of FTA assistance decides an asset acquired under this chapter at least in part with that assistance is no longer needed for the purpose for which it was acquired, the Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to the Government. The Secretary may authorize a transfer for a public purpose other than mass transportation only if the Secretary decides: 49 U.S.C. Section 5334(g) DETERMINATIONS:

(A) The asset will remain in public use for not less than 5 years after the date the asset is transferred;

(B) There is no purpose eligible for assistance under this chapter for which the asset should be used;

(C) The overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

(D) Through an appropriate screening or survey process, that there is no interest in acquiring the asset for Government use if the asset is a facility or land.

Federal Interest in Acquiring Land or Facility

This document implements the requirements of 49 U.S.C. Section 5334(g). Accordingly, FTA hereby provides notice of the availability of the land or facility further described below. Any Federal agency interested in acquiring the affected land or facility should promptly notify the FTA.

If no Federal agency is interested in acquiring the existing land or facility, FTA will make certain that the other requirements specified in 49 U.S.C. Section 5334(g) (1)(A) through (1)(D) are met before permitting the asset to be transferred.

Additional Description of Land or Facility:

Parcel of land approximately 4,485 square feet (identified as 602-608 York Road) located at the intersection of York Road, Dulaney Valley Road, Joppa Road and Allegheny Avenue in Towson, Maryland.

Issued on: May 13, 1996.
Sheldon A. Kinbar,

[FR Doc. 96-12404 Filed 5-16-96; 8:45 am]

BILLING CODE 4910-57-P

Surface Transportation Board¹

[STB Finance Docket No. 32910]

Northwestern Pacific Railroad Authority; Acquisition Exemption; Former Northwestern Pacific Railroad Line From Southern Pacific Transportation Company and Golden Gate Bridge, Highway and Transportation District

Northwestern Pacific Railroad Authority (NWPRA), a noncarrier,² has filed a verified notice of exemption under 49 CFR 1150.31 to acquire former Northwestern Pacific Railroad Line real estate and rail facilities/trackage from Southern Pacific Transportation Company (SP) which extends from Healdsburg, CA (NWP MP 68.2), to Lombard Station, Napa County, CA (SP MP 63.4), via Schellville (NWP MP 40.6/SP MP 72.59), a distance of 66.85 miles.

The purpose of the acquisition is to preserve the railroad corridor for potential future mass transit use.

The transaction was expected to close on or about April 30, 1996.

Freight service on the line will continue to be provided by the California Northern Railroad Company (CNRR) pursuant to long-term lease arrangement with SP.³ NWPRA will take title subject to the CNRR lease, and CNRR will continue to provide freight service. The joint powers agreement forming the NWPRA make an express commitment that in the event the existing operator files an application to abandon or discontinue freight service over the line NWPRA is to acquire in Finance Docket No. 32910, NCRA will be entitled to obtain an easement from NWPRA permitting it to continue freight service over the line. To provide for this, NWPRA states that it will, simultaneously with the closing of this transaction, transfer a permanent and exclusive freight railroad easement to NCRA, which will become effective only upon the cessation of freight

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901.

² NWPRA is an independent joint powers public agency created pursuant to California Government Code Section 6500 by virtue of an agreement among the County of Marin, the Golden Gate Bridge, Highway and Transportation District (GGBHTD), and the North Coast Railroad Authority (NCRA).

³

service by CNRR and the approval by the Board of both the transfer of the easement and the assumption of carrier responsibility by NCRA.

In addition, CNRR currently operates over the segment between NWP MP 26.96 and NWP MP 25.57 pursuant to a freight easement which was retained by SP in a transaction involving GGBHT.⁴ At the closing of the transaction in Finance Docket No. 32910, SP's freight easement will be quitclaimed to GGBHTD, which will then grant to NWPR the rights to operate over the easement area. According to NWPR, NCRA will obtain an easement from NWPR to provide freight service over the segment between NWP MP 26.96 and NWP MP 25.57, at the same time that it acquires the easement mentioned earlier, by which it would take over operations after CNRR ceases its operations.

NWPR states that the future transfer of these easements will imbue NCRA with all carrier rights and responsibilities and that NWPR will remain a noncarrier holder of the underlying real estate. NWPR thus states that it intends in the near future to file either a Motion to Dismiss this Notice or a Petition for a Declaratory Order requesting that it be designated as a noncarrier.

If the verified notice contains false or misleading information, the exemption is void. Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 32910, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue NW., Washington, DC 20423. In addition, a copy of each pleading must be served on David J. Miller, Esq., Hanson, Bridgett, Marcus, Vlahos & Rudy, 333 Market Street, Suite 2300, San Francisco, CA 94105.

Decided: May 9, 1996.

By the Board, David M. Konschnik,
Director, Office of Proceedings.
Vernon A. Williams,

[FR Doc. 96-12455 Filed 5-16-96; 8:45 am]

BILLING CODE 4915-00-P

Surface Transportation Board¹

[STB Finance Docket No. 32907]

Ormet Railroad Corporation; Acquisition and Operation Exemption; Consolidated Rail Corporation

Ormet Railroad Corporation of Wheeling, WV (ORC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Consolidated Rail Corporation's Omal Secondary Track from milepost 60.5 at Powhattan Point, to the end of the line, milepost 72.7 at Omal, a distance of 12.2 miles in Monroe County, OH.

ORC will assume the common carrier obligation associated with the line, holding itself out to render common carrier service by railroad. Consolidated Rail Corporation will perform the operations on the line, solely pursuant to a private contractual arrangement, on behalf of and for the account of ORC.

Consummation was to be on or after April 30, 1996. If the verified notice contains false or misleading information, the exemption is void.

Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 32907, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue NW., Washington, DC 20423. In addition, a copy of each pleading must be served on Fritz R. Kahn, Esq., Suite 750 West, 1100 New York Avenue NW., Washington, DC 20005-3934.

Decided: May 10, 1996.

By the Board, David M. Konschnik,
Director, Office of Proceedings.
Vernon A. Williams,

[FR Doc. 96-12456 Filed 5-16-96; 8:45 am]

BILLING CODE 4915-00-P

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901.

Surface Transportation Board¹

[STB Finance Docket No. 32899]²

Owensville Terminal Company, Inc.; Acquisition and Operation Exemption—Poseyville & Owensville Railroad Company, Inc.

Owensville Terminal Company, Inc. (OTC), a noncarrier, filed a notice of exemption to acquire from Poseyville & Owensville Railroad Company, Inc. (P&O), and operate approximately 11.2 miles of rail branch line in Gibson and Posey Counties, IN, between milepost 271.0 in Poseyville and milepost 282.2 in Owensville.³ The transaction was to be consummated on or after April 19, 1996.⁴

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void. Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) [formerly section 10505(d)] may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction. An original and 10 copies of all pleadings, referring to STB Finance Docket No. 32899, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue NW., Washington, DC 20423. In addition, a copy of each pleading must be served on Robert P. vom Eigen, Esq., Hopkins & Sutter, 888 16th Street NW., Washington, DC 20006.

Decided: April 29, 1996.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901.

² This notice corrects the notice previously served and published in the Federal Register on May 7, 1996. The prior notice erroneously stated that Owensville Terminal Company, Inc., is a subsidiary of RailAmerica, Inc.

³ P&O owns the line and operates it as a branch line, using equipment and labor supplied under contract by Garden Spot & Ohio Railroad (GS&O). The line connects with GS&O at Poseyville.

⁴ P&O was placed into receivership by the Gibson County Superior Court, Gibson County, IN, in Cause No. 26001-9303-CP-0010. On March 19, 1993, the court appointed Robert W. Musgrave (Musgrave) receiver for P&O. Pursuant to a March 26, 1996 court order, Musgrave agreed to sell the line (real estate, leases and licenses, track, ties, and other track materials) to RailAmerica, Inc. (Rail America), a Delaware corporation. RailAmerica, in turn, will assign its rights and interests in the line to OTC, and Huron and Eastern Railway Company, Inc. (Huron), will supply the labor and equipment, as needed, for OTC to operate the line. OTC and Huron are Michigan corporations, and Huron is a RailAmerica subsidiary.

ATTACHMENT “3”

Recording Requested by:
North Coast Railroad Authority

When Recorded mail to:

North Coast Railroad Authority
4 West 2nd Street
Eureka, CA 95501
Attention: Edward M. McLaughlin



AT REQUEST OF:

04/30/1996
FEE: \$
TT: \$

1996 0038423

OFFICIAL RECORDS OF
SONOMA COUNTY
BERNICE A. PETERSON

11:42:53
PGS: 49
PAID

SPACE ABOVE THIS LINE FOR RECORDER'S USE

This instrument is exempt
from Recording Fees
(Govt. Code §27383) and
from Documentary Transfer
Tax (Rev. & Tax Code §11922)

GRANT OF EASEMENT AGREEMENT
(NCRA Freight- Sonoma County)

THIS EASEMENT AGREEMENT is entered into as of April 30, 1996 by and among the Northwestern Pacific Railroad Authority, a joint powers authority created under California law ("Grantor") and North Coast Railroad Authority, a public agency created under California law and its successors and permitted assigns (collectively, "Grantee").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the terms and conditions established in this Easement, Grantor hereby grants to Grantee a perpetual, exclusive easement in the real property described in Exhibit A attached to this Easement.

Grantee shall have the right to use the Easement for operation of freight service, provided that these freight operations shall be subordinate to regularly scheduled passenger commute operations conducted on the Property.

Grantee acknowledges and agrees that it shall not conduct any rail operations of any kind or to otherwise use the Property pursuant to this Easement until (i) Grantor and Grantee enter into a definitive written agreement establishing each party's rights and obligations with respect to use of the Property, (ii) cessation of existing freight operations by California Northern Railroad ("CFNR") and (iii) receipt of approval by the Surface Transportation Board of the proposed transition of freight rail operators on the Property from CFNR to Grantee. With respect to (i) above, the parties agree to execute and record a Memorandum of this proposed agreement evidencing satisfaction with this condition.

299542.1

EXECUTED This 30th day of April, 1996.

GRANTOR

NORTHWESTERN PACIFIC RAILROAD
AUTHORITY

By: [Signature]
Its: CHAIRMAN

JAMES L. HARRISON
Approved as to Form:

[Signature]
Attorney

GRANTEE

NORTH COAST RAILROAD AUTHORITY

By: [Signature]
Its: CHAIRMAN
ALLEN J. HEMPHILL

Approved as to Form

[Signature]
Attorney

299542.1

ATTACHMENT “4”

COOPERATIVE AGREEMENT

This Cooperative Agreement ("Agreement") is entered into the 30th day of April, 1996 by and between the North Coast Railroad Authority ("NCRA") and the Northwestern Pacific Railroad Authority ("NWPRA").

RECITALS

A. The Golden Gate Bridge Highway and Transportation District ("GGBHTD") entered into two Purchase Sale and Option Agreements with Southern Pacific Transportation Company ("SPTC") dated June 1, 1990 pursuant to which GGBHTD acquired the rights to purchase a segment of the Northwestern Pacific Right of Way from Novato Creek in the City of Novato, Marin County to Healdsburg Station in the City of Healdsburg, Sonoma County ("Healdsburg Segment"), a segment running from Ignacio at Highway 37 in Marin County east to a railroad point known as Lombard in Napa County ("Lombard Segment"), and a segment running from Healdsburg Station in the City of Healdsburg, Sonoma County north to Willits Yard in the City of Willits, Mendocino County ("Willits Segment").

B. GGBHTD, the County of Marin and NCRA entered into a Joint Powers Agreement dated May 24, 1995 ("JPA") that created NWPRA and provided for the purchase by NWPRA of the Healdsburg and Lombard Segments and for the purchase by NCRA of the Willits Segment. The JPA also provided that (1) NCRA would assume common carrier freight responsibilities over the Healdsburg, Lombard and

Willits Segments should freight service currently provided by Cal Northern Railroad Company Limited Partnership ("CFNR") pursuant to a Lease Agreement with Southern Pacific Transportation Company for the Northwestern Pacific Line dated August 27, 1993 ("CFNR Lease") terminate for any reason, (2) NWPRA would convey to NCRA a perpetual and exclusive easement for freight service over the Healdsburg and Lombard Segments to be effective upon such a termination of freight service, and (3) NWPRA and NCRA would each be granted specified easement rights to operate rail passenger service on the segments owned by the other. For purposes of this Agreement "CFNR" shall mean CFNR or its successors or assigns.

C. By separate Assignment Agreements dated April 11, 1996, GGBHTD assigned to NWPRA GGBHTD's rights to acquire the Healdsburg and Lombard Segments, and GGBHTD assigned to NCRA GGBHTD's rights to acquire the Willits Segment. NWPRA subsequently entered into an Amended and Restated Purchase Agreement for the Purchase and Sale of the Healdsburg and Lombard Segments ("Healdsburg Agreement"), and NCRA entered into an Amended and Restated Purchase Agreement for the Purchase and Sale of the Willits Segment ("Willits Agreement").

D. NWPRA and NCRA have reached understandings on a number of subjects pertaining to their coordinated acquisition of the Healdsburg, Lombard and Willits Segments, including an adjustment to the northern most boundary of the Healdsburg Segment, to Mills Street in Healdsburg at MP 68.22, and a proposed shared use

arrangement for the Healdsburg Station. The parties have also agreed that NWPRA should serve as assignee from SPTC of the service mark "Northwestern Pacific Railroad" and its related logo based on a similar shared use understanding.

E. The parties now desire to enter into this Agreement to address real estate ownership and management, operating and related issues arising from their coordinated acquisition of the Healdsburg, Lombard and Willits Segments.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing the parties agree as follows:

ARTICLE I. HEALDSBURG PROPERTIES.

1.1 Ownership. On the Initial Closing, as that term is defined in the Healdsburg Agreement, NWPRA shall acquire fee ownership and title to the real property and all related improvements comprising Healdsburg Station, as described in Exhibit A attached to this Agreement (the "Healdsburg Properties").

1.1.1. Restrictions against Transfer and Encumbrances. Neither party will transfer any interest (including licenses and easements) in or encumber the Healdsburg Properties or any portion of them without the prior written consent of the other party, which may be withheld for any reason, provided that NWPRA shall be permitted to lease and otherwise manage the Healdsburg Properties consistent with its management responsibilities as established in Section 1.2 below.

1.2. Management. NWPRA shall act as the sole property manager of the Healdsburg Properties, provided that NCRA shall have such rights to manage the Healdsburg Properties in connection with NCRA's proposed freight and passenger operations as are established in a definitive Operating Agreement to be entered into between NWPRA and NCRA governing NCRA's use of the Healdsburg and Lombard Segments ("Operating Agreement"). NWPRA shall maintain the Healdsburg Properties in accordance with such standards as are adopted by NWPRA from time to time, provided that NCRA will perform such maintenance activities as are established in the Operating Agreement.

1.3. Cost Sharing. All reasonable costs associated with ownership, management and maintenance of the Healdsburg Properties (including utilities, taxes, if any, insurance, etc.) shall be borne by NWPRA. These costs shall be paid for first from lease revenues generated by the Healdsburg Properties, and to the extent said costs exceed lease revenues, from other NWPRA revenue sources. All costs associated with use of Healdsburg Properties for rail purposes shall be paid for as provided in the Operating Agreement.

1.4. Revenue Sharing.

1.4.1 Rental Property Revenues. NCRA and NWPRA shall each be entitled to one half of the lease revenues generated by all of the Healdsburg Properties net of the ownership, management and maintenance expenses attributable to the Healdsburg Properties as provided in Section 1.3 above. NWPRA will collect

all rents from the Healdsburg Properties as property manager, and pay NCRA its share of the net revenues on a quarterly basis.

1.4.2 Inspection Rights. NWPRA shall maintain separate records for the Healdsburg Properties. NCRA shall have the right to inspect NWPRA's records for the Healdsburg Properties at any time during normal business hours, and to seek a separate accounting, at NCRA's own cost to resolve any revenue sharing disputes. Any unresolved dispute shall be submitted to mediation/arbitration as provided for in this Agreement.

1.5. Improvements. Either party shall have the right, at its sole cost and expense, to remove, relocate or modify existing improvements to the Healdsburg Properties, or to add any new improvements upon written notice to and with the prior written consent of the other party, which consent shall not be unreasonably withheld. This right to effect improvements shall be subject to the terms of the CFNR Lease, the Surface Easement Agreement (Healdsburg Station) dated April 30, 1996 by and between SPTC and NWPRA, and the Operating Agreement. Neither party shall make any improvement to the operating right of way that would constitute a breach of any operating agreement governing the operating right of way included in the Healdsburg Properties. All improvements shall be completed in conformance with such construction and contract administration standards governing them as are adopted by NWPRA. All improvements, when completed, shall become part of the Healdsburg Properties. The parties may, but shall not be required, to negotiate cost,

revenue and ownership sharing arrangements with respect to any proposed improvement.

ARTICLE II. OPERATIONS

2.1 NCRA Intercity and Excursion Easement. Subject to Section 2.1.1 below, NWPRA shall grant to NCRA at the Initial Closing a permanent, non-exclusive easement over the Healdsburg and Lombard Segments, including the Healdsburg Properties, for passenger excursion and regional intercity service originating or terminating from points north of Healdsburg in the form of easement attached to this Agreement as Exhibit B (the "NCRA Intercity Easement").

2.1.1 NCRA's Excursion Service. Pursuant to the NCRA Intercity Easement, NCRA may operate excursion service to and from points south of Milepost 67.71 at Healdsburg Station and/or Lombard Segment destinations only with the prior written consent of the NWPRA.

2.2 NWPRA Passenger Commute Easement. NCRA shall grant to NWPRA or its designee upon request a permanent easement over the Willits Segment for regularly scheduled passenger commute service originating anywhere as well as an easement for operation of intercity and intermittent or seasonal passenger service originating or terminating from points south of Healdsburg, in a form to be agreed upon by the parties (the "NWPRA Commuter Rail Easement"). The parties understand and agree that NWPRA commuter

rail easement shall permit no more than one operator of commuter rail service on any portion of the Willits Segment without the written permission of NCRA.

2.3 NCRA's Assumption of Common Carrier Obligations.

NCRA hereby assumes all the residual common carrier freight obligation for the Healdsburg, Lombard and Willits Segments when CFNR terminates its freight service as contemplated in the Agreement Regarding Transition of Freight Operations dated April 30, 1996 entered into by and between NWPRA, NCRA, CFNR and SPTC.

2.4 NCRA Freight Easement. NWPRA shall convey to NCRA at the initial closing, and NCRA shall accept, a permanent, exclusive easement for freight service over the Healdsburg and Lombard Segments in the form attached to this Agreement as Exhibit C to facilitate NCRA's assumption of these obligations.

2.4.1 Reinstitution of Freight Service. For the time that the title warranties established in the Healdsburg and Willits Agreement remain in effect, NCRA shall use its best efforts to re-institute freight service after any stoppage of such service directly or by contract with a third party within six (6) months of any cessation to avoid termination of the General Indemnity established in Section 11.4 of the Healdsburg Agreement.

2.5 CFNR Lease Administration. NCRA shall act as sole administrator of the CFNR Lease from and after the Initial Closing. NCRA shall keep NWPRA fully informed of the status of

the CFNR Lease, and shall provide such information as NWPRA may reasonably request, promptly upon request.

ARTICLE III. SERVICEMARK MATTERS

3.1. Servicemark Ownership. The parties agree that SPTC shall assign to NWPRA at the Initial Closing the mark "Northwestern Pacific Railroad" and related logo, as depicted on Exhibit D (the "Service Marks").

3.2 Servicemark License. NWPRA shall grant to NCRA at the Initial Closing a non-exclusive license to use the Service Marks in any excursion passenger or regional intercity passenger service operation or freight service on any part of the entire NWP Line between Lombard and Korbel, in the form of License Agreement attached to this Agreement as Exhibit E.

ARTICLE IV. PHASED CLOSING PROPERTIES.

4.1 Order of Clean Up. The parties hereby agree that the Phased Closing Properties for both the Healdsburg and Willits Segments will be remediated in the following order: Santa Rosa, Petaluma, Healdsburg, Fulton, Calpella, Willits Yard, Ukiah, and Laughlin. The parties may by mutual written agreement elect to revise this order of clean up. Either party shall have the right to reorder its sites without the approval of the other.

ARTICLE VI. MISCELLANEOUS

6.1 Notices. Any notices or other communications deemed by any party to be necessary or desirable to be given to the other party shall be personally delivered or mailed first class, certified or registered mail, postage prepaid and shall be deemed

delivered on the date of delivery if personally served or two days after it is deposited in the U.S. mail as provided above, when mailed to the other parties, addressed as follows:

If to NWPRA:

Northwestern Pacific Railroad
Authority
c/o Golden Gate Bridge Highway
and Transportation District
Box 9000 Presidio Station
San Francisco, CA 94129-0601
Attn: Carney Campion
Phone No.: 415-923-2200
Telecopy No.: 415-923-2367

with a copy to:

David J. Miller, Esq.
Hanson, Bridgett, Marcus,
Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105-2173
Phone No.: 415-777-3200
Telecopy No.: 415-541-9366

If to NCRA:

North Coast Railroad Authority
4 West 2nd Street
Eureka, CA 95501
Attn: Edward McLaughlin
Phone No.: 704-444-8055
Telecopy No.: 707-441-1324

with a copy to:

Christopher J. Neary, Esq.
110 S. Main Street, Suite C
Willits, CA 95490
Phone No.: 707-459-5551
Telecopy No.: 707-459-3018

Any party may change its address by giving prior written notice to the other party as provided in this Agreement.

6.2 Binding Effect. The parties intend this Agreement to be a binding agreement between them, legally enforceable in a court of law.

6.3 Heading. The section headings in this Agreement are for convenience only and are not to be construed as modifying or governing the language in the section referred to.

6.4 Consent and Approval. Whenever in this Agreement any consent or approval is required, the same shall not be unreasonably withheld, and shall be made expeditiously. If approval is withheld, a statement of written reasons shall accompany the notice of such withholding.

6.5 Severability. Should any part, term or provision of this Agreement be decided by the courts to be illegal or in conflict with any law of the State, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining portions or provisions shall not be affected thereby.

6.6 Entire Understanding. This Agreement and the agreements to be entered into pursuant to it constitute the entire understanding of the parties with respect to its subject matter as of the date hereof, and supersedes any prior or other contemporaneous oral or written understandings and agreements between the parties on the same subject.

6.7 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed a single Agreement.

6.8 Assignment; Successors. This Agreement shall be binding upon and shall inure to the benefit of the permitted successors of the parties. Except to the extent expressly provided herein, no party may assign any right or obligation hereunder without the prior written consent of the other parties.

6.9 Dispute Resolution. Any controversy, claim or dispute arising out of or related to the interpretation, construction,

performance or breach of this Agreement, which cannot be resolved by the parties, shall be submitted to mediation in the County of San Francisco, California, administered by the American Arbitration Association under its Commercial Mediation Rules. Mediation shall proceed and continue until such time as the matter is either resolved or the mediator finds or the parties agree that mediation should not continue. If the parties cannot resolve the controversy, claim or dispute through the mediation process described above, the matter shall be settled by arbitration in the County of San Francisco, California, administered by the American Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. All direct costs and expenses of mediation and arbitration shall be borne equally by the parties; all costs and expenses of each party other than those for payment of the mediator or arbitrator(s) and/or mediation or arbitration facilities shall be borne and paid for by the party that incurs such expenses.

6.10 Attorneys Fees. In the event legal proceedings (other than mediation and arbitration) are instituted to enforce a settlement agreed to in mediation or an arbitration decision, the prevailing party in said enforcement proceeding shall be entitled to its costs of such enforcement proceedings, including attorneys fees, in addition to any other relief to which it may be

entitled.

IN WITNESS WHEREOF, the parties have entered into this Agreement on the date first written above with the intent to be legally bound.

**NORTHWESTERN PACIFIC RAILROAD
AUTHORITY**

By: _____
Its: _____

[Handwritten Signature]
CHAIRMAN

Approved as to Form

[Handwritten Signature]
Attorney

NORTH COAST RAILROAD AUTHORITY

By: _____
Its: _____

[Handwritten Signature]

Approved as to Form

[Handwritten Signature]
Attorney

EXHIBIT A

D.B.
4-11-95

Exhibit "A"

Those parcels of land situate in the City of Healdsburg, County of Sonoma, State of California, described as follows:

Parcel 1:

All that portion as described secondly in the Deed to The San Francisco and North Pacific Railroad, recorded November 25, 1871, in Book 36 of Deeds at Page 94, Sonoma County Records, lying westerly of the westerly line of Front Street.

Parcel 2:

All that portion as described in the Deed to Northwestern Pacific Railroad Company, recorded September 3, 1907, in Book 238 of Deeds at Page 441, Sonoma County Records.

Parcel 3:

All that portion as described in the Deed to Northwestern Pacific Railroad Company, recorded August 28, 1907, in Book 238 of Deeds at Page 405, Sonoma County Records.

Parcel 4:

All that portion as described in the Deed to Northwestern Pacific Railroad Company, recorded December 2, 1907, in Book 239 of Deeds at Page 428, Sonoma County Records.

Parcel 5:

All that portion as described in the Deed to Northwestern Pacific Railroad

Company, recorded November 20, 1871, in Book 36 of Deeds at Page 92, Sonoma County Records.

Parcel 6:

All that portion as described in the Deed to The San Francisco and North Pacific Railroad Company, recorded November 22, 1871, in Book 36 of Deeds at Page 96, Sonoma County Records.

Parcel 7:

All that portion as described in the Deed to The San Francisco and North Pacific Railroad Company, recorded November 23, 1871, in Book 36 of Deeds at Page 97, Sonoma County Records.

EXCEPTING therefrom that portion thereof described in the Deed to Nulco Fabricators, recorded November 20, 1946, in Book 710, Official Records, at Page 304, Sonoma County Records.

Parcel 8:

All that portion as described firstly in Deed to The San Francisco and North Pacific Railroad Company, recorded November 23, 1871, in Book 36 of Deeds at Page 102, Sonoma County Records.

Parcel 9:

All that portion as described in the Deed to The San Francisco and North Pacific Railroad Company, recorded February 26, 1872, in Book 36 of Deeds at Page 223, Sonoma County Records.

Parcel 10:

All that portion as described in Deed to Northwestern Pacific Railroad Company, recorded July 29, 1910, in Book 265 of Deeds at Page 289, Sonoma County Records.

EXCEPTING therefrom that portion thereof described in Deed to Nulco Fabricators, recorded November 20, 1946, in Book 710, Page 304, Official Records of Sonoma County.

Parcel 11:

All that portion as described in Deed to Northwestern Pacific Railroad Company, recorded September 3, 1907, in Book 238 of Deeds at Page 448, Sonoma County Records, lying northeasterly of the most northeasterly line of land, and its northwesterly extension, as described in Deed to Nulco Fabricators, recorded November 20, 1946, in Book 710, Page 304, Official Records of Sonoma County. Said extension having a bearing of North 60° 37' West and distance of 300 feet.

Parcel 12:

All that portion as described in the Deed to The San Francisco and North Pacific Railroad Company, recorded December 13, 1871, in Book 36 of Deeds at Page 112, Sonoma County Records.

Parcel 13:

All that certain piece or parcel of land situate, lying and being in the City of Healdsburg, Sonoma County, State of California, and bounded and described as follows, to wit:

BEGINNING at a point in the Northerly right of way line of the Northwestern Pacific Railroad, which point is the Westerly corner of that certain triangular piece of land conveyed by George W. Heald to The San Francisco and North Pacific Railroad Company by deed dated November 20, 1871, recorded November 23, 1871, in Book 36 of Deeds, Page 97, Records of Sonoma County; running thence along the Northerly right of way line of said railroad, North 66° West, one hundred and twenty-six (126) feet; thence leaving said right of way line North 24° East, twelve and five tenths (12.5) feet; thence South $67^{\circ} 51'$ East, one hundred sixty-six and twenty five hundredths (166.25) feet to a point in the Northerly line of said triangular piece of land; thence West along same forty-four (44) feet, more or less, to the Point of Beginning.

EXHIBIT B

Recording Requested by:

North Coast Railroad Authority

When Recorded mail to:

North Coast Railroad Authority
4 West 2nd Street
Eureka, CA 95501
Attention: Edward M. McLaughlin

SPACE ABOVE THIS LINE FOR RECORDER'S USE

This instrument is exempt
from Recording Fees
(Govt. Code §27383) and
from Documentary Transfer
Tax (Rev. & Tax Code §11922)

GRANT OF EASEMENT AGREEMENT
(NCRA Excursion and Intercity- Sonoma County)

THIS EASEMENT AGREEMENT, dated April 30, 1996, is among the Northwestern Pacific Railroad Authority, a joint powers authority created under California law ("Grantor") and North Coast Railroad Authority, a public agency created under California law and its successors and permitted assigns (collectively, "Grantee").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the terms and conditions established in this Easement, Grantor hereby grants to Grantee a perpetual, exclusive easement in the real property described in Exhibit A attached to this Easement.

Grantee shall have the right to use the Easement for operation of passenger excursion and regional intercity service originating or terminating from points north of Healdsburg California, provided that these operations shall be subordinate to regularly scheduled passenger commuter operations conducted on the Property.

Grantee acknowledges and agrees that it shall not conduct any rail operations of any kind or to otherwise use the Property pursuant to this Easement until Grantor and Grantee enter into a definitive written agreement establishing each party's rights and obligations with respect to use of the Property. The parties agree to execute and record a Memorandum of this proposed agreement evidencing satisfaction of this condition.

EXECUTED This ____ day of April, 1996.

GRANTOR

NORTHWESTERN PACIFIC RAILROAD
AUTHORITY

By: _____

Its: _____

Approved as to Form:

Attorney

GRANTEE

NORTH COAST RAILROAD AUTHORITY

By: _____

Its: _____

Approved as to Form

Attorney

EXHIBIT C

Recording Requested by:

North Coast Railroad Authority

When Recorded mail to:

North Coast Railroad Authority
4 West 2nd Street
Eureka, CA 95501
Attention: Edward M. McLaughlin

SPACE ABOVE THIS LINE FOR RECORDER'S USE

This instrument is exempt
from Recording Fees
(Govt. Code §27383) and
from Documentary Transfer
Tax (Rev. & Tax Code §11922)

GRANT OF EASEMENT AGREEMENT
(NCRA Freight- Sonoma County)

THIS EASEMENT AGREEMENT, dated April 30, 1996, is among the Northwestern Pacific Railroad Authority, a joint powers authority created under California law ("Grantor") and North Coast Railroad Authority, a public agency created under California law and its successors and permitted assigns (collectively, "Grantee").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the terms and conditions established in this Easement, Grantor hereby grants to Grantee a perpetual, exclusive easement in the real property described in Exhibit A attached to this Easement.

Grantee shall have the right to use the Easement for operation of freight service, provided that these freight operations shall be subordinate to regularly scheduled passenger commute operations conducted on the Property.

Grantee acknowledges and agrees that it shall not conduct any rail operations of any kind or to otherwise use the Property pursuant to this Easement until (i) Grantor and Grantee enter into a definitive written agreement establishing each party's rights and obligations with respect to use of the Property, (ii) cessation of existing freight operations by California Northern Railroad ("CFNR") and (iii) receipt of approval by the Surface Transportation Board of the proposed transition of freight rail operators on the Property from CFNR to Grantee. With respect to (i) above, the parties agree to execute and record a Memorandum of this proposed agreement evidencing satisfaction with this condition.

EXECUTED This ____ day of April, 1996.

GRANTOR

NORTHWESTERN PACIFIC RAILROAD
AUTHORITY

By: _____
Its: _____

Approved as to Form:

Attorney

GRANTEE

NORTH COAST RAILROAD AUTHORITY

By: _____
Its: _____

Approved as to Form

Attorney

EXHIBIT D

LICENSE AGREEMENT

THIS AGREEMENT, is entered into on April 30, 1996, by and between NORTHWESTERN PACIFIC RAILROAD AUTHORITY (hereinafter called "Owner"), a Joint Powers Agency, organized and existing under the laws of the State of California, located at P.O. Box 9000, Presidio Station, San Francisco, California, 94129, and NORTH COAST RAILROAD AUTHORITY (hereinafter called "User"), a Public Agency, organized and existing under the laws of the State of California, located at 4 West 2nd Street, Eureka, California, 95501.

WHEREAS, Owner is the owner of the service mark, NORTHWESTERN PACIFIC and Design (hereinafter called "Mark"), as shown on *Exhibit A*.

WHEREAS, User is desirous of using the Mark in connection with its business;

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises hereinafter set forth, the parties agree as follows:

1. GRANT OF LICENSE

Owner grants to User a nonexclusive, nontransferable license to use the Mark in connection with any excursion-passenger or regional intercity-passenger service operation or freight service on any part of the entire NWP Line between Lombard and Korbel; and User accepts the license subject to the following terms and conditions.

2. OWNERSHIP OF MARK

User acknowledges the ownership of the Mark in Owner, agrees that it will do nothing inconsistent with such ownership and that all use of the Mark by User shall inure to the benefit of and be on behalf of Owner. User agrees that nothing in this License shall give User any right, title or interest in the Mark other than the right to use the Mark in

accordance with this License; and User agrees that it will not attack the title of Owner to the Mark or attack the validity of this License.

3. QUALITY STANDARDS

User agrees that the nature and quality of all services rendered by User in connection with the Mark and all related advertising, promotional and other related uses of the Mark by User shall conform to standards set by and be under the control of Owner.

4. QUALITY MAINTENANCE

User agrees to cooperate with Owner in facilitating Owner's control of such nature and quality, to permit reasonable inspection of User's operation and to supply Owner with specimens of all uses of the Mark upon request. User shall comply with all applicable laws and regulations and obtain all appropriate government approvals pertaining to the sale, distribution and advertising of goods and services covered by this License. User agrees to be bound by the terms and conditions of the Operating Agreement between NWPRA and NCRA establishing operating quality-maintenance standards for NCRA's operations.

5. FORM OF USE

User agrees to use the Mark only in the form and manner and with appropriate legends as prescribed from time to time by Owner and not to use any other trademark or service mark in combination with the Mark without prior written approval of Owner.

6. MERCHANDISING REVENUE

All profits from the sales of merchandise, such as tee-shirts, posters, and the like, bearing the Mark shall be payable annually to NWPRA.

7. INFRINGEMENT PROCEEDINGS

User agrees to notify Owner of any unauthorized use of the Mark by others promptly as it comes to User's attention. Owner shall have the sole right and discretion to bring infringement or unfair-competition proceedings involving the Mark.

8. TERM

This Agreement shall continue in force and effect for the term of the Federal Trademark Registration to be applied for the mark as shown in *Exhibit A* unless sooner terminated as provided for herein.

9. TERMINATION FOR CAUSE

Owner shall have the right to terminate this Agreement upon thirty (30) days' written notice to User in the event of any affirmative act of insolvency by User or upon the appointment of any receiver or trustee to take possession of the properties of User or upon the winding-up, sale, consolidation, merger or any sequestration by governmental authority of User or upon breach of any of the provisions hereof by User.

10. EFFECT OF TERMINATION

Upon termination of this Agreement, User agrees to immediately discontinue all use of the Mark and any term confusingly similar thereto, to destroy all printed materials bearing the Mark and that all rights in the Mark and the goodwill connected therewith shall remain the property of Owner.

11. INTERPRETATION OF AGREEMENT

It is agreed that this Agreement may be interpreted according to the laws of the State of California and the United States of America.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

OWNER:

**NORTHWESTERN PACIFIC
RAILROAD AUTHORITY**

By: _____
Its: _____

Approved as to Form:

USER:

NORTH COAST RAILROAD AUTHORITY

By: _____
Its: _____

Approved as to form

Attorney

EXHIBIT A



ASSIGNMENT OF SERVICE MARKS

WHEREAS, Southern Pacific Transportation Company, a Delaware corporation ("Seller"), located and doing business at One Market Plaza, San Francisco, California, 94105, has adopted and used the marks identified in Exhibits A and B, attached hereto (the "Marks"); and

WHEREAS, Northwestern Pacific Railroad Authority ("Buyer"), located and doing business in care of the Golden Gate Bridge District, Box 9000, Presidio Station, San Francisco, California, 94129-0601, is desirous of acquiring the exclusive rights to the Marks;

NOW, THEREFORE, for good and valuable consideration, receipt and sufficiency of which are hereby acknowledged, Seller does hereby assign unto Buyer, all of its right, title and interest in and to the Marks, together with the goodwill of the business symbolized by the Marks.

Dated: April 30, 1996

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Delaware Corporation

By: Michael D. Ingert

Title: VICE PRESIDENT

EXHIBIT A
NORTHWESTERN PACIFIC RAILROAD

EXHIBIT B

See attached





ATTACHMENT “5”

2009 California Public Utilities Code - Section 105000-105004 :: Chapter 1. General Provisions And Definitions

PUBLIC UTILITIES CODE

SECTION 105000-105004

105000. This part shall be known and may be cited as the Sonoma-Marín Area Rail Transit District Act.

105001. It is the intent of the Legislature in enacting this part to provide for a unified, comprehensive institutional structure for the ownership and governance of a passenger rail system within the Counties of Sonoma and Marin that shall operate in harmony with existing freight service that operates upon the same rail line and serves the Counties of Humboldt, Marin, Mendocino, Napa, and Sonoma. It is the further intent of the Legislature that the district established by this act may succeed to the powers, duties, obligations, liabilities, immunities, and exemptions of both the Sonoma-Marín Area Rail Transit Commission and the Northwestern Pacific Railroad Authority upon their dissolution. Because there is no general law under which this district could be formed, the adoption of a special act and the formation of a special district is required.



ATTACHMENT “6”

**OPERATING & COORDINATION AGREEMENT
FOR THE NORTHWESTERN PACIFIC LINE**

THIS OPERATING & COORDINATION AGREEMENT ("Agreement"), dated as of the 23 day of June, 2011, by and between SONOMA-MARIN AREA RAIL TRANSIT DISTRICT, created under California law ("SMART"), and NORTH COAST RAILROAD AUTHORITY, created under California law ("NCRA").

RECITALS:

WHEREAS, pursuant to the JPA Agreement (defined below) and the Cooperative Agreement and set of Principles of Agreement (each dated as of April 30, 1996), all between NCRA and Northwestern Pacific Railroad Authority ("NWPRA"), various commitments were made, including (1) that NWPRA would acquire title to the Healdsburg and Lombard Segments (defined below) and that the NCRA would acquire title to the Willits Segment (defined below), (2) that upon acquisition of the Healdsburg and Lombard Segments NWPRA would convey a perpetual and exclusive easement for the operation of freight service and grant contract rights for the operation of passenger excursion service over the Healdsburg and Lombard Segments to NCRA, and (3) that upon acquisition of the Willits Segment NCRA would convey to NWPRA a permanent easement over the Willits Segment for operation of regularly scheduled passenger commuter service and for operation of certain intercity and other passenger service; and

WHEREAS, on April 30, 1996, NWPRA acquired ownership of the Healdsburg and Lombard Segments and NCRA acquired title to the Willits Segment; and

WHEREAS, NWPRA conveyed the aforementioned easement to NCRA covering the Healdsburg and Lombard Segments; and

WHEREAS, NCRA conveyed the aforementioned easement to NWPRA covering the Willits Segment; and

WHEREAS, on August 19, 1996, NWPRA and NCRA entered into an Operating Agreement for certain portions of the Northwestern Pacific Railroad line (the "Operating Agreement 1996"); and

WHEREAS, the 1996 Operating Agreement was a condition precedent to effectuate the Grant of Easement conveyed by NWPRA to NCRA and by entering into this new operating agreement, the parties do not intend to, in any way, revoke, rescind or otherwise nullify the effectuation of the Grant of Easements from NWPRA to NCRA or NCRA to NWPRA (or its successor, SMART); and

WHEREAS, the 1996 Operating Agreement provided that if NWPRA undertook to provide passenger commuter operations, the parties would enter into an agreement (referred to therein as the "Coordination Agreement") that described in detail the respective rights and obligations of the parties with respect to maintenance, capital expenditures, dispatching, scheduling of operations, environmental liability, taxes and other matters concerning the joint use of the Healdsburg Segment and the Lombard Segment; that passenger commuter operations would receive operating priority over freight operations, provided that freight service continued

to be provided on the Healdsburg Segment and the Lombard Segment in a manner that meets the needs of the shippers on the line; that passenger operations disrupt NCRA's freight operations to the minimum extent possible; and that the agreement would include provisions that address the issues set forth in Schedule 3.10 to the Operating Agreement 1996; and

WHEREAS, SMART is NWPRA's successor in interest; and

WHEREAS, SMART intends to undertake passenger commuter operations on the Healdsburg Segment and on a portion of the Willits Segment pursuant to its easement thereon (together defined more specifically below as the "Shared Track") and may later expand such operations to include some or all of the Lombard Segment and more or the rest of the Willits Segment covered by its easement thereon; and

WHEREAS, multi-use pathways are part of SMART's enabling legislation and integral to SMART's project and planned use of its property; and

WHEREAS, on September 13, 2006, NCRA and Northwestern Pacific Railroad Company ("NWPCo"), a California corporation, entered into a lease agreement for NWPCo to provide freight and excursion service over (inter alia) the Subject Segments;

WHEREAS, the Parties desire to enter into this Agreement setting forth terms and conditions for the use and management of the Subject Segments, superseding the Operating Agreement 1996 and all prior agreements between the parties relating in any way to the subject matter of the Operating Agreement 1996 (including, without limitation, the JPA Agreement, the Cooperative Agreement and the set of Principles Agreement), it being the express intent of the parties to have this Agreement govern exclusively, and formalizing SMART's consent to designation of NWPCo as NCRA's operator, pursuant to Section 16.04 of the Operating Agreement 1996.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, NCRA and SMART hereby agree as follows:

ARTICLE I – DEFINITIONS

In addition to capitalized terms defined in the Agreement, Exhibit 1 (incorporated herein by reference) is a list of additional definitions used in this Agreement.

ARTICLE II – MULTI-USE PATHWAY AND OPERATING RIGHTS

SECTION 2.01 NCRA Passenger Excursion Service. In addition to the rights granted pursuant to the aforementioned easements granted to NCRA on the Healdsburg Segment and the Lombard Segment, but subject to the condition set forth in SECTION 7.08, NCRA shall have the right to use the Healdsburg Segment and the Lombard Segment to provide passenger excursion service intended primarily for entertainment and recreation and not primarily for transportation, provided that the service originates and terminates off of the Healdsburg Segment (except at Healdsburg Station, approximately NWP MP 68.00) and the Lombard Segment (except to the extent the Lombard Segment remains not part of the Shared Track) and does not provide

intermediate stops on the Healdsburg Segment (except at Healdsburg Station) or the Lombard Segment (except to the extent the Lombard Segment remains not part of the Shared Track) (the "NCRA Passenger Excursion Service"); provided that NCRA may not use the Healdsburg Segment or the Lombard Segment for any other type of passenger service, except that NCRA may transport officers, employees and freight business invitees of NCRA. NCRA acknowledges that it shall have no right to conduct intercity passenger rail service on the Healdsburg Segment or the Lombard Segment. NCRA shall have no right to appoint more than two (2) Passenger Excursion Service contract operators on any portion of the Shared Track during any twelve (12) month period.

SECTION 2.02 Industrial Track. NCRA, at its own expense, shall have the exclusive right to manage all existing or later built track on the Healdsburg and Lombard Segments used solely for NCRA Freight Service (the "Industrial Track"). NCRA shall have the right to enter into new industrial track agreements on the Subject Segments that are necessary for NCRA to discharge its exclusive common carrier rail freight responsibilities, provided that all such agreements are subject to (and conterminous with) this Agreement (including but not limited to ARTICLE VI hereof) and, on the Lombard and Healdsburg Segments only, such agreements (i) include the standard agreement provisions provided by SMART and the requirements of SMART's Encroachment Policy adopted April 22, 1996, as may be amended from time to time; and (ii) are approved in advance by SMART (which approval shall not be unreasonably withheld, conditioned or delayed).

SECTION 2.03 SMART Pathway Rights. Subject to the terms of this Agreement, SMART shall have the right to design and construct Pathways on the portion of the Willits Segment that is part of the Shared Track.

ARTICLE III - NWPCO AS NCRA OPERATOR

SMART hereby consents to NWPCo as NCRA's designated operator. NCRA hereby acknowledges that any agreement it may have with NWPCo or any successor designated operator or any third party operator admitted to the Shared Track or the Lombard Segment (collectively defined herein as, the "Operator") is subject to and conterminous with this Agreement.

ARTICLE IV - MAINTENANCE

SECTION 4.01 Inspections. Within thirty (30) days after the Execution Date of this Agreement, SMART plans to make an inspection of the Shared Track and the Lombard Segment, the result of which shall be contained in a written report. NCRA shall have the right (but not the obligation) to participate in the inspection and shall be furnished with a copy of the inspection report. No more than thirty (30) days before the commencement of NCRA train operations, NCRA and SMART shall make a joint inspection of that portion of the Shared Track and the Lombard Segment on which NCRA plans to operate to document the actual condition and the FRA classification of such track, the result of which shall be contained in a written report (delineated by FRA track classification), reviewed and approved by both Parties within thirty (30) days after the completion of the inspection. This joint inspection may be waived if the

parties agree (in their sole discretion) that a joint inspection is unnecessary due to the FRA inspections conducted in connection with the commencement of NCRA service.

SECTION 4.02 NCRA Maintenance Responsibility. Subject to SECTION 4.04, NCRA shall perform all ordinary inspection and maintenance functions (including the provision of security, emergency grade crossing notification and response, vegetation control within 15 feet of the center line of track and any additional vegetation control required by law) on any portion of the Lombard Segment and the Healdsburg Segment that it operates on, at its sole cost and expense. NCRA shall maintain such Track to at least FRA Class 1 standards, provided that NCRA's inspection, maintenance and security responsibilities shall not include any equipment and buildings used solely by SMART.

SECTION 4.03 Second Joint Inspection. At least ten (10) days before any Changeover Date as described in SECTION 4.04, NCRA and SMART shall make a joint inspection of the applicable segment of the Shared Track to document the actual condition and the FRA class of the Track thereon, the result of which shall be contained in a written report (delineated by FRA track classification), reviewed and approved by both Parties within ten (10) days after the completion of the inspection.

SECTION 4.04 SMART Maintenance Responsibility. SMART shall have the right to take over maintenance on any portion of the Shared Track at any time and an obligation to take over maintenance of any portion of the Shared Track before commencement of construction of Changes and/or Additions to facilitate SMART Commuter Operations. With at least one (1) month advance notice, SMART shall notify NCRA of the date on which it will take over maintenance of any particular portion of the Shared Track. The date of such take over with respect to any particular portion shall be the "Changeover Date" with respect to such portion. After the Changeover Date with respect to any particular portion of Shared Track, SMART shall perform all ordinary maintenance functions and shall inspect and maintain the Track to at least the same requirements set forth in SECTION 4.02. SMART shall maintain all Pathways from inception at its sole cost and expense.

SECTION 4.05 Maintenance Plans and Reports. Each Party shall, on an annual basis, provide such other Party with a maintenance plan (including vegetation control) and maintenance budget on any portion of the Track where such Party has a maintenance obligation. Each Party also will provide to the other Party annual reports of its actual maintenance expenditures on a schedule agreed to by the Parties.

ARTICLE V - OPERATIONS AND DISPATCHING

SECTION 5.01 Dispatching. SMART shall manage and control the Shared Track. SMART shall dispatch the Shared Track and the Lombard Segment. Subject to the ultimate authority of the dispatcher, SMART shall manage and control SMART Commuter Operations and Ancillary Passenger Service, and NCRA shall manage and control NCRA Freight Service and NCRA Passenger Excursion Service. If SMART's dispatcher is not present and on duty, then upon three days notice to SMART, NCRA shall have the right to take over dispatching on the Shared Track and the Lombard Segment. Both parties have the right to seek injunctive relief with respect to any allegation that the SMART dispatcher is not present and on duty. This

SECTION is not subject to ARTICLE XIV. This SECTION is not intended to apply in any situations where SMART's dispatcher is present and on duty, but NCRA has an objection regarding the dispatcher's conduct of his/her duty.

SECTION 5.02 Rule Book. After prior consultation with NCRA, wherein differences or disputes are reasonably addressed, SMART shall have the right to specify a rule book, employees timetable, special instructions, standard operating procedures, and/or any other rules it reasonably determines are necessary for the safe and efficient operation of the Shared Track and Lombard Segment, and upon receipt of copies thereof, NCRA and the Operator shall follow such rules. Without limiting the generality of SECTION 16.05, maximum allowable freight and passenger train speeds on any segment of track shall adhere to FRA regulations established for the Class of Track on that segment.

SECTION 5.03 Priority.

(a) SMART Commuter Operations shall have reasonable priority over all other operations on the Shared Track, provided that such priority shall not materially adversely affect NCRA's performance of its common carrier obligation, NCRA's conduct of rail freight operations, or NCRA's ability to provide adequate service to shippers and receivers. SMART Commuter Operations will require blocks of time ("windows") during which there will be no NCRA Freight Service or NCRA Passenger Excursion Service on segments of the Shared Track. These windows may need to be widened in the future as passenger traffic develops and/or formalized in order to meet the FRA's requirements for temporal separation of freight and passenger service to support waiver or other relief from Positive Train Control requirements on the Shared Track. Notwithstanding the generality of the foregoing, SMART expects to have greater flexibility during midday periods, late evenings, nights and weekends/holidays. SMART will meet and confer with NCRA to schedule freight service slots on the Shared Track. A list of windows is attached hereto, for illustrative purposes only, as Exhibit 2.

(b) After consultation with NCRA, SMART shall establish a schedule of all train operations and other activities on the Shared Track. Six months before commencement of SMART Commuter Operations, SMART shall prepare and furnish to NCRA a draft definitive schedule for SMART Commuter Operations. NCRA shall have the right to provide SMART with comments on the draft definitive schedule and SMART shall consider any such comments before finalizing the definitive schedule. SMART shall finalize the definitive initial schedule at least ninety days before commencement of SMART Commuter Operations.

(c) NCRA Passenger Excursion Service and SMART Ancillary Passenger Service shall (i) be subordinate to SMART Commuter Operations, (ii) be of equal dispatch priority (as between themselves) and (iii) shall have reasonable priority over NCRA Freight Service, subject to the standard set forth in the first sentence of SUBSECTION (a) of this SECTION and provided that NCRA shall have the right to subordinate the NCRA Passenger Excursion Service (but not the SMART Ancillary Passenger Service) to NCRA Freight Service.

ARTICLE VI - MODIFICATIONS AND IMPROVEMENTS

Changes and/or Additions to the Subject Segments shall be subject to the following requirements:

SECTION 6.01 Right to Make Changes; Financial Responsibility. Each Party shall have the right to make Changes and/or Additions to the Subject Segments at its own cost and expense, except as provided in Exhibit 3. The Parties acknowledge that Changes and/or Additions to the Subject Segments may require alteration or modification of existing Track or other improvements and that the cost and expense of such alteration or modification would be the financial responsibility of the Party then making the Changes and/or Additions. SMART shall manage and control construction of Changes and/or Additions on the Shared Track, including SMART's construction pursuant to its Initial Design Plans; provided that NCRA shall manage and control construction of NCRA-funded and administered Changes and/or Additions on (i) the Lombard Segment or (ii) that portion of the Shared Track between Healdsburg (MP 68.22) and Cloverdale (MP 85.35) before any Changeover Date with respect to such portion; provided further that SMART shall reasonably consider NCRA proposals to manage and control construction of NCRA-funded and administered Changes and/or Additions on the Shared Track not meeting the requirements of subpart (ii) of the foregoing proviso.

SECTION 6.02 Plans. The Party undertaking the Changes and/or Additions (the "Constructing Party") to the Subject Segments shall deliver to the other Party a set of the design plans (including available schematic drawings and specifications) for Changes and/or Additions at the conceptual stage, thirty percent (30%) completion stage, sixty percent (60%) completion stage and Final Plans. The Party reviewing plans (the "Reviewing Party") shall have thirty (30) days from receipt to review and comment on the conceptual plans and the 30% plans, fifteen (15) days from receipt to review and comment on the 60% plans and fifteen (15) days from receipt to review and approve the Final Plans.

SECTION 6.03 Review.

(a) If the Reviewing Party reasonably determines that the proposed design or location of Changes and/or Additions, as reflected in any such set of plans, would materially interfere with NCRA Freight Service or SMART Commuter Operations (as the case may be), the Reviewing Party shall provide written comments to the Constructing Party explaining its concerns in this regard within the applicable review period. The Reviewing Party shall have an obligation to identify material interference concerns at the plan review stages where they arise and the Constructing Party shall have no obligation to address concerns that could have been raised in an earlier plan review stage. The Parties shall then use their best efforts to agree on modifications to any such set of plans to resolve such expressed concerns. If the Reviewing Party fails to provide written comments to the Constructing Party on any set of plans within the applicable review period, such Party shall be deemed to have approved such set of plans. Once a set of plans is approved pursuant to this SECTION, or Material Modifications are approved pursuant to SECTION 6.04 such plans or Material Modifications shall be deemed to be final and a part of the Subject Segments as though already constructed.

(b) NCRA's review of the Initial Design Plans shall follow the review provisions in SUBSECTION (a), except that NCRA and SMART hereby agree that the Siding and Spur Provisions (Exhibit 3) are the solution for all cost issues pertaining to freight siding and spur track connections (including without limitation material interference issues) and that (except as set forth in Exhibit 3) SMART shall have no obligation to pay for freight siding or spur track connections.

SECTION 6.04 Construction; Modification. The Constructing Party shall construct Changes and/or Additions in accordance with the Final Plans approved by the other Party pursuant to this ARTICLE VI and subject to any modifications issued by the Constructing Party that are authorized by this subparagraph. The Constructing Party shall notify and obtain the other Party's advance written consent to any Material Modifications. The other Party shall use its best efforts to complete its review of such Material Modifications as soon as possible but in any event within three (3) business days of receipt of such Material Modifications from the Constructing Party. The other Party's approval shall not be unreasonably withheld, conditioned or delayed unless any such Material Modifications would materially interfere with the other Party's use of the involved property (as articulated in SECTION 6.03).

SECTION 6.05 Operations During SMART Construction. The Parties have agreed to the following reasonable accommodations for freight operations during SMART's initial and any subsequent construction of Changes and/or Additions for SMART Commuter Operations:

(a) SMART shall establish a schedule for NCRA Freight Service providing 12-hour daytime windows on Sundays and Thursdays on portions under construction or proximate to construction. During such times, NCRA shall have uninterrupted access to such segments for NCRA Freight Service and any construction activities will be subject to such uninterrupted access. During all other times, SMART shall have exclusive access to such segments.

(i) Provided that for a single period not to exceed eighteen (18) weeks, when SMART is undertaking its primary track-laying project on its initial operating segment (presently expected to include, as relevant, the line from the Ignacio Wye to Santa Rosa Railroad Square), which might include using the mechanized track laying equipment (herein, the "Track Construction Period"), SMART shall establish a schedule for NCRA Freight Service providing 48-hour single window on Saturday and Sunday. During such times, NCRA shall have uninterrupted access to track segments under construction or proximate to construction and SMART construction activities will be subject to the requirement that NCRA be afforded such uninterrupted access. During all other times (i.e., 5 consecutive days), SMART shall have exclusive access to the track under construction. SMART shall give NCRA at least thirty (30) days notice of the planned date for commencement of the Track Construction Period. For any subsequent construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish an arrangement similar to the Track Construction Period.

(ii) Provided further that for a single period not to exceed eighteen (18) days during SMART's construction of its initial operating segment (presently expected to include, as relevant, the line from the Ignacio Wye to Santa Rosa Railroad Square), there shall be

no NCRA Freight Service on the Shared Track (herein, the "Designated Shutdown Period"). During the Designated Shutdown Period, SMART shall have exclusive access to the Shared Track. SMART shall give NCRA at least sixty (60) days notice of the planned date for commencement of the Designated Shutdown Period. For any subsequent construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish an arrangement similar to the Designated Shutdown Period.

(b) During SMART's construction of its initial operating segment (presently expected to include, as relevant, the line from the Ignacio Wye to Santa Rosa Railroad Square), except for the Designated Shutdown Period, if SMART's construction renders the Shared Track out of service for freight for seven (7) days (herein, a "Shutdown Period"), SMART shall have the right to shut down the segment in issue and alternative service to NCRA freight customers shall be arranged, in accordance with this SUBSECTION:

(i) SMART shall procure and pay for an on-call broker to arrange for truck transportation, truck transload or other alternative transportation service for rail freight customers (the "Broker"). NCRA shall notify the Broker if one of its customers wishes to receive such alternative transportation arranged by the Broker. Upon such notification, NCRA shall provide Broker with information pertaining to the alternative transportation, including the identity of the shipper, the shipper's contact information, the location of the shipper facility and the commodities and desired schedule for transportation. The Broker shall arrange alternative transportation and inform NCRA and SMART of the arrangements. The customer shall pay the cost of the alternative transportation. SMART shall reimburse the customer for the alternative transportation to the extent it exceeds the cost that the customer would have paid to NCRA. SMART shall have the right to confer in advance with the Broker regarding the cost of alternative transportation in order to ensure that the cost is reasonable.

(ii) To the extent NCRA arranges alternative transportation for one of its customers or a customer makes its own alternative transportation arrangements, the customer shall pay the cost of the alternative transportation. SMART shall reimburse the customer for the costs of the alternative transportation to the extent it exceeds the cost that the customer would have paid to NCRA, provided that SMART shall have the right to confer in advance with NCRA or the customer regarding the cost of alternative transportation and approve such additional costs in advance, in order to ensure that the cost is reasonable. SMART's approval shall not be unreasonably withheld, conditioned or delayed.

(iii) In either case, SMART also shall pay to NCRA an amount equal to the product of (i) the number of days of the Shutdown Period *multiplied by* (ii) the daily average number of loaded cars originated, terminated or moving over Shared Track calculated from the sixty-day period before the beginning of the Shutdown Period *multiplied by* \$500.

(iv) Alternative transportation service may not work for certain shippers. SMART will use commercially reasonable efforts to advise NCRA in advance of any Shutdown Period so that NCRA can inform those shippers of such cessations.

(c) For any subsequent construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish an arrangement similar to the above for Shutdown Periods.

(d) Except as set forth in this ARTICLE VI, NCRA shall have no right to compensation of any kind or character for any interference with or interruptions in freight service during construction or for any extra costs or administrative burdens associated with freight operations or cessations during construction.

SECTION 6.06 Operations During NCRA Construction. The Parties do not anticipate that NCRA's Changes and/or Additions on the Shared Track would require cessation of SMART Commuter Operations. Such cessations could, but for this SECTION, harm SMART's Commuter Operations. To avoid any such harm, NCRA's Changes and/or Additions on the Shared Track shall be conducted on weekends and during non-Rush Hour periods, as designated on the schedule established pursuant to SECTION 5.03. If NCRA determines that its Changes and/or Additions on the Shared Track would require cessation of SMART Commuter Operations, it shall so notify SMART thirty (30) days in advance of such cessation and SMART shall arrange for a bus bridge of its passengers around the affected Shared Track during NCRA construction. SMART shall consult with NCRA regarding the bus bridge and such additional operating costs and secure NCRA's approval in advance of commencing the bus bridge (or incurring related costs). NCRA's approval shall not be unreasonably withheld, conditioned or delayed. NCRA shall reimburse SMART for any such documented increased costs associated with the bus bridge for the duration of the cessation. Except as set forth in this SECTION, SMART shall have no right to compensation for such cessations.

SECTION 6.07 Construction Schedule. The Constructing Party shall deliver to the other Party on a weekly basis, (i) a schedule for the construction of Changes and/or Additions over the next four weeks showing both the sequence and location of such construction work and (ii) a general schedule of construction activity planned over the next 12 weeks. Upon request of the other Party, the Constructing Party shall meet to discuss and review the schedules.

SECTION 6.08 Ownership; Salvage. The Party that pays for Changes and/or Additions shall own such Changes and/or Additions and shall be entitled to sell or reuse the material removed but not reused in the Changes and/or Additions ("Salvage Materials") regardless of when or by whom such material was installed or paid for; provided that upon subsequent removal or replacement of such Changes and/or Additions by such Party, that Party shall have an obligation to restore the relevant portion of the track to at least the condition that existed immediately before the Changes and/or Additions; provided further that the Party removing the Salvage Materials shall give the other Party written notice of, and a right of first refusal for thirty (30) days from such notice on, any proposal to sell the Salvage Materials; provided further that SMART shall indemnify NCRA for any claims by counter-parties under the agreements listed on Exhibit 4 that Salvage Materials purchased by NCRA from the Healdsburg Segment or the Lombard Segment violated such agreements; provided further that NCRA shall be entitled to reuse Salvage Materials from the Willits Segment, but shall have an obligation to remove such Salvage Materials from the construction site within thirty (30) days of notice from SMART, which notice will state the time period when such Salvage Materials will be available for removal. Except as set forth in this ARTICLE VI, neither Party shall have an obligation to

compensate the other Party for the costs of prior Changes and/or Additions, removal of prior Changes and/or Additions or Salvage Materials.

ARTICLE VII – OTHER RIGHTS AND OBLIGATIONS – OPERATIONS

SECTION 7.01 Expansion of Shared Track. If SMART wants to expand the geographic scope of the Shared Track to include any portion of the Lombard Segment or any additional portion of the Willits Segment, SMART shall notify NCRA and the Parties shall amend (effective on the date provided in the notice) this Agreement to expand the geographic scope of the Track that constitutes Shared Track under this Agreement and all provisions governing Shared Track shall control over other provisions pertaining to such portions. Such notice by SMART shall be not less than six (6) months in advance of SMART's designated effective date for expansion of the Shared Track. Notwithstanding the foregoing, for the duration of any transportation emergency or non-rail infrastructure outage, SMART shall have the right to conduct SMART Commuter Operations on any portion of the Subject Segments not already part of the Shared Track. In such emergencies, SMART shall give NCRA any advanced notice that is practicable and the Parties will make arrangements for SMART to assume management, control and dispatching of rail operations pursuant to ARTICLE V and maintenance responsibilities pursuant to ARTICLE IV.

SECTION 7.02 No Admission Of Third Parties. SMART acknowledges that it has no right to grant, and shall not attempt to grant, to any third party any rights whatsoever to conduct rail freight operations on the Healdsburg Segment, the Lombard Segment, or the Willits Segment. SMART and NCRA each (i) acknowledges that it has no right to grant any third party rights to conduct freight or passenger rail service of any kind on the portion of the Subject Segments owned by the other Party and (ii) agrees not to grant such rights (except as required by law) during the term of this Agreement on the portion of the Subject Segments owned by it. For the avoidance of doubt, bona fide contractors (including but not limited to NWPCo and its successors and entities operating trains pursuant to SECTION 7.09) are not third parties within the scope of this SECTION.

SECTION 7.03 Contractors. Each Party shall have the right to arrange for all or some of its rights and/or obligations under this Agreement to be performed by one or more contractors; provided that (i) neither Party shall admit a contractor to the Shared Track without first providing the other Party with an insurance certificate for Workers Compensation insurance for such contractor and an insurance certificate for liability insurance for such contractor naming the other Party as an additional insured, (ii) the contract shall be subject to the terms of this Agreement and (iii) each Party shall remain responsible for performance of this Agreement. The requirements of this SECTION apply to any successor Operator and to any contract operator of NCRA Passenger Excursion Service or any contract operator of SMART Ancillary Passenger Service.

SECTION 7.04 Track Modifications Required by Law. SMART shall pay all of the cost and expense of Positive Train Control on the Shared Track, except SMART's obligation to pay for the cost and expense of cabling up NCRA's or Operator's locomotive fleet shall be limited to (i) the number of locomotives in regular freight operations on the day that the Positive Train Control system becomes operational or (ii) five (5) locomotives, whichever is lower. (For

the avoidance of doubt, SMART shall have no obligation to pay for the cost and expense of cabling up any additional locomotives, including additional locomotives that may be used for NCRA Passenger Excursion Service.) Once furnished and installed, NCRA shall be responsible for ongoing maintenance of the on-board equipment. Except as set forth in Exhibit 3, NCRA shall be responsible for the cost and expense of new freight siding and spur track connections required by law. Each Party shall pay for and perform any and all work required by lawful authority in connection with construction, renewal, maintenance and operation of the Track on the property it owns; provided that if the Party otherwise responsible for such work can reasonably demonstrate that such work would not be required in the absence of the other Party's operations or operating rights or that such work would be substantially lower in cost in the absence of the other Party's operations or operating rights, then the other Party shall be responsible for the cost and performance of all such work (in the first instance) or the Parties shall agree to an allocation of the cost of such work (in the second instance).

SECTION 7.05 Hazardous Materials. Neither Party shall use, generate, transport, handle or store Hazardous Materials on the Subject Segments other than as may be used by the Party in its operations in the normal course of business or, in the case of NCRA, as may be transported by NCRA in its capacity as a common carrier by rail and in all events in accordance with Applicable Laws. Neither Party shall dispose of Hazardous Materials of any kind on the Subject Segments.

SECTION 7.06 Locomotive Storage. At each location where a Party parks or stores its locomotives while not in use, the Party shall implement appropriate contamination containment procedures with respect to fuel or lubricant drippings.

SECTION 7.07 Shared Track Blockages. Neither Party shall store or stop equipment or cars on the Shared Track (excluding Industrial Track or other Track designated for the storage, stoppage or passing of trains or equipment or cars) in a way that blocks or fouls the Shared Track. Both Parties shall have the right to help stalled trains or equipment of the other Party (or to move improperly stored or stopped equipment or cars).

SECTION 7.08 NCRA Passenger Excursion Service and SMART Ancillary Passenger Service. NCRA Passenger Excursion Service on any segment of the Healdsburg Segment shall not commence until ninety (90) days after commencement of SMART Commuter Operations on the same segment; provided that NCRA may operate NCRA Passenger Excursion Service on the portion of the Healdsburg Segment between Healdsburg Station and the northern end of the Healdsburg Segment at any time when such portion is not under construction. SMART may operate SMART Ancillary Passenger Service on the Willits Segment. Specific plans for the operation of NCRA Passenger Excursion trains or SMART Ancillary Passenger Service shall be provided to and discussed with the other party at least 60 days in advance of their proposed date(s) of operation.

SECTION 7.09 Company Material. SMART (directly or through contractors) shall have the right to move its own company material on the Shared Track or the Lombard Segment, including but not limited to track material and passenger equipment in transport for use in the SMART Commuter Operations. If SMART elects to use a contractor to move such company material, NCRA shall have a right of first refusal for ten (10) days on the work at the contractor's

quoted rate; provided that such right of first refusal shall not apply to passenger equipment in transport for use in the SMART Commuter Operations.

ARTICLE VIII – OTHER RIGHTS AND OBLIGATIONS – PROPERTY

SECTION 8.01 No Liens. Neither Party will take any action or fail to take any action which would cause the Subject Segments to be encumbered by any mortgage, indenture, bond, note or lien of any kind that would have a material, adverse effect on the other Party's conduct of rail operations thereon or that would require the payment of money by the other Party.

SECTION 8.02 Nuisance. Neither Party shall use nor permit the use of the Subject Segments in any manner that will tend to create a nuisance or would materially interfere with the continued commercial, industrial or transportation corridor uses of the Subject Segments.

SECTION 8.03 Future Easements. Each Party reserves the exclusive right to approve or deny any and all future easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the property it owns (the Willits Segment in the case of NCRA and the Healdsburg and Lombard Segments in the case of SMART), provided that approval of such future easements, leases, licenses or rights of occupancy by either Party does not unreasonably interfere with SMART Commuter Operations or NCRA Freight Service.

SECTION 8.04 Utilities. Before a Changeover Date for any particular segment, NCRA shall pay all bills for utilities, including without limitation those for water, sewer, gas and electric service to the Subject Segments, and the Parties shall negotiate in good faith for SMART's reimbursement to NCRA for any utility costs attributable to SMART's activities. After a Changeover Date for any particular segment, each Party shall pay all bills for utilities used solely for such Party's consumption, including without limitation those for water, sewer, gas and electric service, and SMART shall pay all bills for all utilities on the Shared Track, subject to the provisions of SECTION 9.01.

SECTION 8.05 Defeasance. Neither Party shall make any use of the Subject Segments that is inconsistent with the owning Party's right, title and interest therein and which may cause the right to use and occupy such property to revert to any third party.

SECTION 8.06 Right of Entry; Cooperation. Each Party hereby grants to the other Party a general right of entry to the Subject Segments owned by it for any lawful purpose related to the rights and obligations of the other Party (whether by law, easement or this Agreement), subject to reasonable advanced notice and safety procedures, and each Party agrees to cooperate in the arrangement of such entry.

SECTION 8.07 Incorporation of Reserved Rights. SMART hereby reserves all of the reservations made by NWPRA with respect to the Lombard Segment and the Healdsburg Segment in Sections 1.02 and XV of the Operating Agreement 1996, as fully restated in Exhibit 5. NCRA hereby reserves all of the Certain Reserved Rights with respect to the Willits Segment, as stated in Exhibit 5.

SECTION 8.08 Settlement & Consent Agreements. Any and all settlement agreements of any kind or character (including but not limited to the agreement between NCRA and the City of Novato) whether executed before or after this Agreement are subordinate and subject to this Agreement. Each Party agrees to secure any necessary agreement amendments or estoppel certificates with respect to any such agreements executed before this Agreement.

ARTICLE IX - COST SHARING

SECTION 9.01 Dispatching Cost Sharing. Commencing with the first month where there is NCRA Freight Service or NCRA Passenger Excursion Service (herein, "NCRA Trains") and for each month thereafter (regardless of whether there are NCRA Trains in any particular month) before there are any SMART Commuter Operations or SMART Ancillary Passenger Service (herein "SMART Trains"), NCRA shall pay SMART a fee of \$2,500 for dispatching services. Commencing with the first month where there are NCRA Trains and SMART Trains (assuming that NCRA Trains have commenced), NCRA shall pay SMART a fee for dispatching services that is negotiated in good faith between the parties. If the parties are unable to reach an agreement, then the issue shall be submitted to arbitration. The arbitrator shall decide the appropriate equitable allocation of dispatch costs based upon the parties' use of the rail line. While arbitration is pending NCRA shall pay SMART the fee applicable before SMART commenced operations.

SECTION 9.02 Maintenance Cost Sharing. After SMART assumes responsibility for maintenance on a particular segment pursuant to SECTION 4.04, NCRA shall pay SMART for that segment the charges set forth on Exhibit 6.

SECTION 9.03 Reporting and Invoices for Dispatching and Maintenance. Within ten (10) days of the end of a month, NCRA shall send SMART a report of the prior month's carloadings showing carloadings that originated, terminated, or moved overhead on the track maintained by SMART. The report also shall identify any cars that weighed more than 263,000 pounds. By the end of the month in which the carloading report was due, SMART shall send NCRA an invoice for the above-described dispatching and maintenance fees.

SECTION 9.04 Annual Adjustment. The fees in SECTION 9.01 and SECTION 9.02 shall be adjusted annually on the anniversary of the Effective Date by the same percentage as the percentage increase or decrease, if any, in the STB's rail cost adjustment factor, unadjusted for productivity. If the rail cost factor ceases to exist, the Parties shall use the Consumer Price Index for all Urban Consumers (CPI-U) issued by the U.S. Department of Labor's Bureau of Labor Statistics or a substantially similar index.

SECTION 9.05 Five-Year Adjustment. The Parties have concluded that the above-referenced fees fairly reflect the dispatching and maintenance expenses that NCRA reasonably would have expended in the absence of SMART Commuter Operations. On the fifth anniversary of the Effective Date and every five (5) years thereafter, the Parties will negotiate in good faith to re-set the dispatching and maintenance fees in accord with this rationale.

SECTION 9.06 No Other Related Compensation. Except as set forth above in this ARTICLE IX, or elsewhere in this Agreement, neither Party shall owe the other Party any compensation for maintenance, dispatching or operations on the other Party's property.

ARTICLE X - ALLOCATION OF LIABILITY; INDEMNITY

SECTION 10.01 Allocation of Liability.

(a) It is the express intention of the Parties that NCRA assumes the risk of and agrees to indemnify, defend and hold harmless SMART, or any agent, contractor, lessee or licensee of SMART, from any orders, directives, judgments, causes of action, penalties, fees, claims, costs, liabilities, damages, losses and expense (including without limitation court costs and attorneys' fees and all costs of investigating, remediating, or responding to the existence of a claim), or demands of whatsoever nature or source for (i) personal injury to or death of persons whomsoever; (ii) property damage or destruction of whatsoever nature (including without limitation damage to property of SMART or NCRA, or property in NCRA's care, custody or control, and third party property), (iii) violation of any Applicable Laws; or (iv) breach of this Agreement (collectively, "Claims") when such Claims arise out of acts or omissions (whether or not negligent) of NCRA or any agent, contractor, lessee or licensee of NCRA occurring on the Subject Segments after the Execution Date and before the termination of this Agreement; except that NCRA shall not indemnify, defend or hold harmless SMART, or any agent, contractor, lessee or licensee of SMART, to the extent that the Claim arises out of or in connection with acts, omissions or negligence of SMART, or any agent, contractor, lessee or licensee of SMART or is otherwise covered by SECTION 10.01(b).

(b) It is the express intention of the Parties that SMART assumes the risk of and agrees to indemnify, defend and hold harmless NCRA, or any agent, contractor, lessee or licensee of NCRA, from any orders, directives, judgments, causes of action, penalties, fees, claims, costs, liabilities, damages, losses and expense (including without limitation court costs and attorneys' fees and all costs of investigating, remediating, or responding to the existence of a claim), or demands of whatsoever nature or source for (i) personal injury to or death of persons whomsoever; (ii) property damage or destruction of whatsoever nature (including without limitation damage to property of NCRA or SMART, or property in SMART's care, custody or control, and third party property); (iii) violation of any Applicable Laws; or (iv) breach of this Agreement (collectively, "Claims") when such Claims arise out of acts or omissions (whether or not negligent) of SMART or any agent, contractor, lessee or licensee of SMART occurring on the Subject Segments after the Execution Date and before the termination of this Agreement; except that SMART shall not indemnify, defend or hold harmless NCRA, or any agent, contractor, lessee or licensee of NCRA, to the extent that the Claim arises out of or in connection with acts, omissions or negligence of NCRA, or any agent, contractor, lessee or licensee of NCRA or is otherwise covered by SECTION 10.01(a).

SECTION 10.02 Procedure.

(a) Claims. If any claim or demand (short of a lawsuit) shall be made by any person against an indemnified Party under this ARTICLE X, the indemnified Party shall,

within sixty (60) days after actual notice of such claim or demand, cause written notice thereof to be given to the indemnifying Party, provided that failure to notify the indemnifying Party shall not relieve the indemnifying Party from any liability which it may have to the indemnified Party under this ARTICLE X except to the extent that the rights of the indemnifying Party are in fact prejudiced by such failure. The indemnifying Party shall have the right, at its sole cost and expense, to participate in the defense of, any such claim or demand, and the Parties agree to cooperate fully with each other in connection with any such defense, such negotiation or claim settlement. In any event, the indemnified Party shall not make any settlement of any claims or demands which might give rise to liability on the part of the indemnifying Party under this ARTICLE X without either providing the indemnifying Party with a full release with respect to such liability or obtaining the prior written consent of the indemnifying Party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or demand relates to a matter for which the Parties, under the terms of this ARTICLE X, are to share a Loss, each Party shall be entitled to select its own counsel and defend itself against the claim or demand at its sole cost and expense, and neither Party shall make any settlement of any such claim or demand without giving the other Party reasonable prior notice of the proposed settlement.

(b) Actions. In the event any lawsuit is commenced against either Party for or on account of any Loss for which the other Party may be solely or jointly liable under this Agreement, the Party thus sued shall give the other Party timely written notice that such action is pending, and thereupon the Party so notified may assume or join in the defense thereof. Neither Party shall be bound by any judgment against the other Party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified and the opportunity to assume or join in the defense of the action has been afforded, the Party so notified shall, to the extent of its liability under this Agreement, be bound by the final judgment of the court in such action.

SECTION 10.03 Insurance Not Limit On Indemnification. In no event shall the indemnification provisions of this ARTICLE X be limited to the insurance coverage required under ARTICLE X.

SECTION 10.04 No Delay Claims. Except as provided in SECTION 6.05, SECTION 6.06 or in instances of intentional or willful delays (in which case the Party asserting the claim shall have the burden of proof), neither Party shall have any claim against the other Party for interruption of or delay to such Party's business; and neither party shall have any claim against the other Party for loss of revenue or profit.

SECTION 10.05 Survival. Each Party hereto covenants and agrees that its obligations under this ARTICLE X shall continue in full force and effect notwithstanding the full payment of all sums due under this Agreement or the satisfaction, discharge or termination of this Agreement in any matter whatsoever.

SECTION 10.06 Claims. Notwithstanding Government Code Section 905(i) any claim arising out of this Agreement shall be subject to and governed by Government Code sections 900 et seq., commonly referred to as the Government Claims Act, provided that the

filing of a demand for arbitration pursuant to ARTICLE XIV shall satisfy any requirement to file suit within the time specified by the Government Claims Act.

ARTICLE XI – INSURANCE

SECTION 11.01 Insurance.

(a) NCRA shall, at its sole cost and expense, procure the following kinds of insurance for the term of this Agreement:

(i) Comprehensive Railroad Liability insurance including contractual liability providing bodily injury, including death, personal injury and property damage coverage with limits as follows: (1) as of the Effective Date, a combined single limit of at least one million dollars (\$1,000,000) for each incident and a general aggregate limit of at least two million dollars (\$2,000,000); (2) as of the commencement of NCRA Freight Service, a combined single limit of at least ten million dollars (\$10,000,000) for each incident and a general aggregate limit of at least ten million dollars (\$10,000,000); and (3) as of the commencement of NCRA Excursion Service, a combined single limit of at least fifty million dollars (\$50,000,000) for each incident and a general aggregate limit of at least fifty million dollars (\$50,000,000).

(ii) Workers' compensation coverage and employer's liability coverage, with a minimum limit of \$2 million each accident, with coverage for Federal Employer's Liability Act exposure, each with a waiver of subrogation endorsement;

(iii) During any time when NCRA is engaged in construction on the Shared Track or the Lombard Segment: (1) railroad protective liability insurance, with liability limits of \$2,000,000 per occurrence and \$6,000,000 aggregate; (2) builders risk insurance, excluding coverage for rail vehicles, with a direct damage limit of \$100,000,000, and earthquake and flood limits of \$50,000,000 each; (3) general liability insurance, with limits of \$2,000,000 per occurrence, and \$4,000,000 aggregate; and (4) excess liability insurance, with limits of \$75,000,000 in excess of the underlying limits general liability limits.

(iv) Provided that, if NCRA can reasonably demonstrate that the cost of its Comprehensive Railroad Liability insurance was higher than it would have been but for the presence of the Pathways, then SMART shall reimburse NCRA for the difference in cost.

(b) SMART shall, at its sole cost and expense, procure the following kinds of insurance for the term of this Agreement:

(i) Prior to commencement of operations: Comprehensive Railroad Liability insurance including contractual liability providing bodily injury, including death, personal injury and property damage coverage with limits as follows: (i) as of the commencement of SMART Commuter Operations, a combined single limit of at least one hundred million dollars (\$100,000,000) for each incident and a general aggregate limit of at least one hundred million dollars (\$100,000,000).

(ii) Effective on the date of the first Changeover Date and during any time when SMART is engaged in construction on the Shared Track: (1) railroad protective

liability insurance, with liability limits of \$2,000,000 per occurrence and \$6,000,000 aggregate; (2) builders risk insurance, excluding coverage for rail vehicles, with a direct damage limit of \$100,000,000, and earthquake and flood limits of \$50,000,000 each; (3) general liability insurance, with limits of \$2,000,000 per occurrence, and \$4,000,000 aggregate; (4) excess liability insurance, with limits of \$75,000,000 in excess of the underlying limits general liability limits; and (5) workers' compensation coverage, with a minimum limit of \$2 million each accident, with a waiver of subrogation endorsement. SMART shall have the option to obtain and maintain such insurance in an owner controlled insurance program, in accordance with California law.

(c) The limits in SECTION 11.01(a) and (b) shall be reviewed every five (5) years to ensure that such limits are in accordance with industry standards, provided that they shall not be lowered.

(d) This insurance shall contain Broad Form Liability covering the indemnity provisions contained in this Agreement, severability of interests and name the other Party as an additional insured with respect to liabilities arising out of the primary insured's obligations in this Agreement. If coverage is purchased on a "claims made" basis, it shall provide for at least a three (3) year extended reporting or discovery period, which shall be invoked should insurance covering the time period of this Agreement be cancelled unless replaced with a policy containing the same retroactive date as the policy being replaced. NCRA may self-insure to \$1,000,000; SMART may self-insure to \$5,000,000.

(e) Upon the failure of either Party to maintain insurance as provided herein, the other Party shall have the right after giving ten (10) days written notice, to obtain insurance and receive prompt reimbursement.

(f) Both Parties represent and warrant to the other Party that this Agreement has been reviewed with its insurance agent(s)/broker(s) and the agent(s)/broker(s) has been instructed to procure the insurance coverage required herein and name the other Party as an additional insured.

(g) Each Party shall furnish to the other Party certificates of insurance evidencing the required coverage and endorsement(s) and upon written request shall provide certified duplicate copies of any policy. The insurance company(ies) issuing such policy(ies) to either Party shall notify the other Party in writing of any material alteration in any policy, including but not limited to any change in the retroactive date in any "claims made" policies or any reduction of aggregation limits, or cancellation thereof, at least thirty (30) days prior thereto.

(h) The insurance policy(ies) shall be written by an insurance company or companies with current Best's Insurance Guide Rating of A or better. Such insurance company shall be authorized to transact business in the State of California.

ARTICLE XII – REPRESENTATIONS AND WARRANTIES

SECTION 12.01 SMART. SMART represents and warrants that:

(a) SMART has full power and authority to enter into this Agreement and, subject to necessary regulatory authority, to carry out its obligations hereunder.

(b) This Agreement has been duly authorized, executed and delivered by SMART and is a legal, valid and binding obligation of SMART, enforceable against SMART in accordance with its terms, including without limitation the terms of SECTION 15.03, except as such enforceability may be limited by (a) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and (b) general principles of equity (regardless of whether such enforceability is considered a proceeding in equity or at law). Neither the execution and delivery of this Agreement by SMART, the consummation by SMART of the transactions contemplated hereby, nor compliance or performance by SMART with any of the provisions hereof does or will violate any judgment, order, law, rule or regulation applicable to SMART or any provisions of the JPA Agreement or SMART's by-laws or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon any assets of SMART (other than the encumbrances on the Subject Segments created by this Agreement).

SECTION 12.02 NCRA. NCRA represents and warrants that:

(a) NCRA has full power and authority to enter into this Agreement and to carry out its obligations hereunder.

(b) This Agreement has been duly authorized, executed and delivered by NCRA and is a legal, valid and binding obligation of NCRA, enforceable against NCRA in accordance with its terms, including without limitation the terms of SECTION 15.03, except as such enforceability may be limited by (a) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and (b) general principles of equity (regardless of whether such enforceability is considered a proceeding in equity or at law). Neither the execution and delivery of this Agreement by NCRA, the consummation by NCRA of the transactions contemplated hereby, nor compliance or performance by NCRA with any of the provisions hereof does or will violate any judgment, order, law, rule or regulation applicable to NCRA or any provisions of NCRA's certificate of incorporation or by-laws or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon any assets of NCRA (other than the encumbrances on the Subject Segments created by this Agreement).

ARTICLE XIII - COORDINATION COMMITTEE

SMART's General Manager and NCRA's Executive Director shall establish a Coordination Committee consisting of not more than two (2) representatives of each Party. NCRA may select representatives from the Operator. SMART may select representatives from its operator, if any. The Coordination Committee shall provide the functions set forth for it in SECTION 5.03, SECTION 6.05 and SECTION 6.06 and shall be a forum for the Parties to share information, discuss matters submitted by one Party to the other Party for review and/or approval, and seek resolution of any issues between the Parties with respect to this Agreement. The Coordination Committee shall meet regularly (in person or telephonically) and also as necessary to address issues between the Parties that require prompt resolution.

ARTICLE XIV - ARBITRATION

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SECTION 14.01 Controversies Subject to Arbitration. The Parties hereby agree that any failure to pay money when due under the Agreement, any failure to maintain insurance as required under this Agreement, and any disputes arising under SECTION 5.01 or SECTION 16.09 are not subject to arbitration. Otherwise, any and all claims, disputes or controversies between SMART and NCRA arising out of or concerning the interpretation, application, or implementation of this Agreement that cannot be resolved by the Parties through the Coordination Committee or by negotiations shall be submitted (subject to SECTION 14.02) to binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules. If the AAA discontinues promulgation of the Commercial Arbitration Rules, the Parties shall use the AAA's designated successor rules, and if the AAA does not designate successor rules, the Parties shall agree on other rules. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

SECTION 14.02 Controversies Subject to "Baseball" Style Arbitration.

(a) Any and all claims, disputes or controversies between SMART and NCRA regarding the number of turn-outs on the portion of the Shared Track north of Santa Rosa Railroad Square (MP 53.8)(or any portion thereof) shall be determined by the arbitrator picking, between the list submitted by NCRA and the list submitted by SMART, which Party's list comes closest the standard set forth in the applicable paragraph of Exhibit 3. The arbitrator shall not be authorized to award a composite or blend of the two lists. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(b) Any and all claims, disputes or controversies between SMART and NCRA regarding the amount NCRA shall pay SMART for dispatching services after commencement of SMART Trains pursuant to SECTION 9.01 shall be determined by the arbitrator picking, between the amount submitted by NCRA and the amount submitted by SMART, which Party's amount is most reasonable. The arbitrator shall not be authorized to award a composite or blend of the two amounts. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

SECTION 14.03 Expedited Arbitration Schedule. The Parties hereby agree that the expedited arbitration procedures set forth in the AAA Commercial Arbitration Rules, Optional Rules for Emergency Measures of Protection, shall apply to any disputes arising under ARTICLE IV, ARTICLE VI or SECTION 7.07 and accordingly the Party applying to the AAA for such emergency relief pursuant to this SECTION shall not be required to set forth in its application the reasons why the Party is entitled to such relief or the reasons why such relief is required on an emergency basis.

SECTION 14.04 Pending Resolution. During such arbitration proceedings, the business and the operations to be conducted under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary.

SECTION 14.05 Party Expenses. Except as otherwise set forth in this SECTION, attorneys' fees, costs and expenses incurred by the Parties in connection with such arbitration shall be apportioned as set forth in the AAA Commercial Arbitration Rules. Any administrative fees imposed by the AAA, including but not limited to the initial filing fee, case service fee, proceed fee, and final fee, shall be apportioned evenly between the Parties. The arbitrator shall have the power to award attorneys' fees and costs to either Party if the arbitrator determines in its reasonable discretion that the position of the other Party to the arbitration was frivolous or otherwise an abuse of the arbitration process.

ARTICLE XV - TERM AND TERMINATION

SECTION 15.01 Term. This Agreement shall have a term of forty (40) years and shall automatically renew for three successive terms of ten (10) years each, unless either Party gives notice (at least six [6] months before expiration of the then current term) of its intention to not renew.

SECTION 15.02 Default. An "Event of Default" by either Party shall have occurred if any of the following shall occur:

(a) if either Party fails to pay an amount of money due under this Agreement in excess of \$5,000 and such failure continues thirty (30) days after written notice from the other Party of such failure.

(b) if either Party fails to meet its insurance obligations under this Agreement.

(c) for other obligations not subject to arbitration, if either Party fails to meet any such obligation and such failure continues ninety (90) days after written notice from the other Party of such failure.

(d) for obligations subject to arbitration, if an arbitrator finds that either Party has failed to meet any material obligation under this Agreement.

SECTION 15.03 Remedies Upon Event of Default. If a Party causes an Event of Default to occur (the "Defaulting Party"), the other Party may, at its option:

(a) proceed by appropriate judicial proceedings, either at law or in equity, to enforce performance or observance by the Defaulting Party of the applicable provisions of this Agreement, to enforce the award of an arbitrator and/or to recover damages (together with attorneys' fees and such Party's other costs) for a breach thereof, or to seek other remedies, which may include, but are not limited to:

(i) for default under Section 15.02(a), monetary damages;

(ii) for default under Section 15.02(b), injunctive relief suspending operations of the Defaulting Party until such time as the default is cured and appropriate measures are taken to ensure that future defaults will not occur;

- (iii) for default under Section 15.02(c), injunctive relief or monetary damages;
- (iv) for cessation of all NCRA Freight Service or of all SMART Commuter Operations lasting more than 24 months where the party who has ceased such operations cannot reasonably demonstrate that such operations will recommence within 36 months, or for sustained or persistent Events of Default, termination of this Agreement; provided that in the case of such cessation of NCRA Freight Service or SMART Commuter Operations, the 24 month period shall be tolled for a maximum of 12 months if the party that has ceased such operations is prevented from re-starting such operations by the existence of an injunction. In the event of termination, the non-Defaulting Party shall continue to operate under its easement rights substantially as contemplated by this Agreement as if it were in effect and the Defaulting Party shall have no right to operate but shall maintain its statutory and easement rights. Nothing in this Agreement shall be construed as a forfeiture of the property easement rights held by either party, which are described in the Recitals. In the event the Defaulting Party is NCRA, NCRA shall take all actions necessary and expedient before the STB to secure abandonment and/or discontinuance of service authority on behalf of NCRA and the Operator.

(b) cure the default by making any such payment or performing any such obligation, as applicable, at the Defaulting Party's sole expense, without waiving or releasing the Defaulting Party from any obligation.

(c) The foregoing rights and remedies are and shall be deemed to be cumulative and the exercise of any of them shall not be deemed to be an election excluding the exercise at any time of a different or inconsistent remedy.

(d) Any waiver by either Party of any Event or Default under this Agreement or any delay of either Party in enforcing any remedy set forth herein shall not constitute a waiver of the right to pursue any remedy at a later date or terminate this Agreement for any subsequent Event or Default, nor shall any such waiver in any way affect either Party's right to enforce the Agreement.

(e) The Operator may, in its sole discretion, perform any of the obligations imposed upon NCRA hereunder and cure any default on behalf of NCRA and such performance or cure shall have the same effect as if it had been performed or cured by NCRA; however, nothing in this subsection shall reduce or relieve NCRA of any rights or obligations under this Agreement.

ARTICLE XVI- MISCELLANEOUS TERMS

SECTION 16.01 Reports, Records and Inspections.

(a) FRA and CPUC Reports. The Party responsible for maintenance on a particular segment of Track shall provide a copy of all reports (including) all notices or citations alleging deficiencies from FRA track standards of track inspections by FRA or California Public Utilities Commission inspectors on such segment to the other Party promptly upon receipt of such reports, but in no case more than ten (10) business days after receipt.

(b) Records. Each Party shall maintain full and complete records of all maintenance, rehabilitation, track relocation or removal performed on the Subject Segments and shall keep all track profiles and track charts up to date so as to show all program maintenance and rehabilitation performed on the Track. Copies of updated records and track charts on the Subject Segments shall be provided by each Party to the other Party promptly upon request.

(c) Inspections. Each Party shall have the right at any time, upon reasonable notice (except for emergencies, where no notice is required) to inspect the Track then maintained by the other Party for conformity with the standards of maintenance contained in this Agreement and to verify compliance with this Agreement; provided that such inspections shall not unreasonably interfere with the other Party's operations; that all persons conducting such inspections shall execute appropriate releases and indemnity acknowledgements; and that the other Party may accompany the inspecting Party during such inspections. Each Party shall be notified by the other of, and have the right to attend, any FRA or CPUC inspection of any Track on the Subject Segments

(d) Inspection of Records. Each Party shall have the right at any time upon reasonable notice to inspect the other Party's books, records, or any other reports or supporting documents or materials necessary to determine compliance with any provisions of this Agreement. The inspecting Party will conduct inspections during normal business hours and the other Party shall make its facilities available to the inspecting Party's inspectors to permit such inspection without undue interference with the other Party's operations. Any direct expense arising from making the inspection shall be borne by the inspecting Party.

SECTION 16.02 Billing and Payment. Invoices submitted to the Parties under this Agreement ("Invoices") must be itemized with a detailed description of the charges. Invoices shall be paid within thirty (30) days after receipt thereof by the payor. If a Party disputes any items on an Invoice, that party may not deduct the disputed item from the payment, but shall notify the payee of the disputed item and the Parties shall use best efforts to resolve the disputed items within thirty (30) days after receipt of the disputed payment. No Invoice shall be submitted later than one hundred twenty (120) days after the last day of the calendar month in which the expense or cost covered thereby is incurred.

SECTION 16.03 Employee Matters. The Parties agree that the employees of each Party are not the employees of the other Party. Each Party assumes exclusive responsibility for compliance with all employment laws and regulations applicable to its operations, as well as the

terms of any collective bargaining agreements to which each Party may, from time to time, be a party. During the term of and following termination of this Agreement, each Party shall bear any and all costs of protection of its current or future employees, arising from any labor protective conditions imposed on such Party by the STB or any other regulatory agency or statute as a result of such Party's use, operation or maintenance of the Subject Segments and any related agreements or arrangements, including collective bargaining agreements, or arising as a result of the termination of this Agreement. Nothing contained herein is intended to be for the benefit of any such employee nor should any employee be considered a third party beneficiary hereunder.

SECTION 16.04 Offers of Financial Assistance. If either NCRA or the Operator elect to abandon/discontinue common carrier operations on all or any portion of the Healdsburg Segment or the Lombard Segment and SMART or a party designated by SMART files an offer of financial assistance under 49 U.S.C. § 10904, NCRA shall agree to negotiate with SMART or SMART's designee regardless of whether another party files such an offer.

SECTION 16.05 Compliance with Laws. During the term of the Agreement, each Party shall comply with all Applicable Laws on the Subject Segments, including but not limited to those controlling air, water, noise, hazardous waste, solid waste, and other pollution, or relating to the use, generation, storage, transport, release, or disposal of Hazardous Materials.

SECTION 16.06 Entire Agreement; Effect of Prior Agreements. It is the intention of the Parties that this Agreement shall govern use of their respective rights under their respective easements. This Agreement contains the entire agreement between the Parties, and supersedes all other prior oral or written agreements, commitments, or understanding with respect to the matters provided herein as of the Execution Date, including but not limited to the Operating Agreement 1996, the Cooperative Agreement and the Principles Agreement. (For the avoidance of doubt, the Parties intend by the prior sentence to terminate, annul, replace and make void all of the terms of all prior agreements including any terms that purport to survive termination.) The Parties hereby waive all claims of any kind or character arising out of or under or during the pendency of any of the prior agreements, including without limitation, claims which but for this sentence would survive under California Code Section 1542. THE PARTIES INTEND THIS WAIVER TO COVER ANY CLAIMS THEY DO NOT KNOW OF AGAINST EACH OTHER. For the avoidance of doubt, as of the execution of this Agreement, the Parties have no claims against each other. Notwithstanding the foregoing, at the time of executing this agreement, the parties have not yet resolved and finalized the reconveyance of a deed of trust, to NCRA, encumbering certain property located in Mendocino County commonly referred to as the Ukiah Depot Property. A promissory note executed by NCRA in favor of SMART's predecessor, NPWRA, has been cancelled by SMART, but the reconveyance of the deed of trust has not occurred. Accordingly, this section is not intended to release any obligations SMART may have in regard to effectuating the reconveyance of the deed of trust. No modification of this Agreement shall be binding upon the Party affected unless set forth in writing and duly executed by the Party to be charged; provided that nothing in this agreement shall affect the rights and obligations of the Parties under the Operating Agreement 1996 with respect to matters arising prior to the Effective Date of this Agreement.

SECTION 16.07 Notices. All notices, demands, requests, or other communications which may be or are required to be given, served or sent by either Party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent:

(a) If intended for SMART, by mailing by registered or certified mail, return receipt requested, with postage prepaid, or by national overnight delivery service, prepaid, addressed to SMART at:

SMART District Office
750 Lindero Street, Suite 200
San Rafael, CA 94901
Attention: General Manager

with a copy to:

Office of Sonoma County Counsel
575 Administration Drive
Room 105
Santa Rosa, CA 95403
Attention: County Counsel

(b) If intended for NCRA, by mailing by registered or certified mail, return receipt requested, with postage prepaid, or by national overnight delivery service, prepaid, addressed to NCRA at:

North Coast Rail Authority
419 Talmage Road, Suite M
Ukiah, CA 95482
Attention: Executive Director

with a copy to:

Christopher J. Neary, Esq.
110 S. Main Street, Suite C
Willits, California 95490

And to:

The Northwestern Pacific Railroad Company
250 Cambridge Avenue, Suite 104
Palo Alto, CA 94306-1554

Each notice, demand, request or communication which shall be mailed by registered or certified mail to either Party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request, or communication shall be either received by the addressee or refused by the addressee upon presentation. Either Party may change the name of the recipient of any notice, or his or her address, at any time by complying with the foregoing procedure.

SECTION 16.08 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of SMART and NCRA, and shall be binding upon the successors and assigns of SMART and NCRA, subject to the limitations hereinafter set forth. NCRA may not assign its rights under this Agreement or any interest therein, attempt to have any other person assume its obligations under this Agreement, or permit the Operator to assign its lease of NCRA's ownership or operating easement on the Subject Segments without the prior written consent of SMART, which consent may not be unreasonably withheld or delayed. SMART may not assign its rights under this Agreement or any interest therein, attempt to have any other person assume its obligations under this Agreement, or permit any operator to assign its rights of the Subject Segments without the prior written consent of NCRA, which consent may not be unreasonably withheld or delayed. NCRA may not change the Operator or change/engage a contract operator of NCRA Passenger Excursion Service without the prior written consent of SMART, which consent shall not be unreasonably withheld, conditioned or delayed. SMART may not change/engage a contract operator of SMART Ancillary Passenger Service without the prior written consent of NCRA, which consent shall not be unreasonably withheld, conditioned or delayed. Prior to a proposed change in the Operator, NCRA shall secure any necessary approvals from the STB and such other regulatory approvals as may be then required.

SECTION 16.09 Severability. If fulfillment of any provision hereof or any transaction related hereto shall involve transcending the limit of validity prescribed by law, then the obligation to be fulfilled shall be reduced to the limit of such validity; and if any clause or provision herein contained operates or would prospectively operate to invalidate this Agreement in whole or in part, then such clause or provision only shall be held ineffective, as though not herein contained, and the remainder of this Agreement shall remain operative and in full force and effect.

SECTION 16.10 Headings: Interpretation. The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement. With respect to interpretation of this Agreement and resolution of any ambiguities, neither Party shall be deemed to be the drafter of the Agreement.

SECTION 16.11 Waiver. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.

SECTION 16.12 Counterparts. This Agreement may be executed in counterparts both of which, when executed and delivered, shall be deemed to be an original and both counterparts taken together shall constitute but one and the same instrument.

SECTION 16.13 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California.

SECTION 16.14 Agreement Runs With Land; Recordation. This Agreement shall run with the land, except that any parcel transferred by a Party to an unaffiliated person or entity for purposes other than rail operations or trail use that does not contain any facilities used in

connection with the rail operations of the other Party, shall be deemed removed from the property as applicable. This Agreement may be recorded.

SECTION 16.15 Not for the Benefit of Others. This Agreement and each and every provision herein is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any third party to recover by way of damages or otherwise against either of the Parties hereto. Notwithstanding the fact that it has certain direct obligations under this Agreement, NWPCo is not a party to this Agreement and this Agreement shall not be construed to create or increase any right in NWPCo to recover by way of damages or otherwise against either of the Parties hereto.

SECTION 16.16 Survival. The Parties agree that their respective rights, duties and obligations under any provision which by its terms imposes an obligation on either Party that is continuing in nature shall survive the expiration or termination of this Agreement.

SECTION 16.17 Force Majeure. Neither Party shall be liable to the other in damages nor shall a default be deemed to have occurred, and each Party shall be excused from performance of any of its obligations hereunder, except obligations involving the payment hereunder of money to the other Party or to a third Party, during the time when such non-performance is occasioned by fire, earthquake, flood, explosion, wreck, casualty, strike, riot, insurrection, civil disturbance, act of public enemy, embargo, war, act of God; provided, that if either Party suffers a work stoppage due to a labor dispute, such Party shall make such reasonable efforts to staff its operations so as to minimize disruptions.

SECTION 16.18 Participation In Proceedings. If either Party asks the other Party in writing to participate in regulatory proceedings or public hearings of any kind concerning the first Party, the first Party shall reimburse the other Party for the reasonable expenses incurred (including without limitation attorneys' fees) as a result of such participation. Absent such a written request, neither Party shall have an obligation to participate in any such regulatory proceedings or public hearings.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in duplicate as of the day and year first herein written.

SONOMA-MARIN AREA RAIL
TRANSIT DISTRICT

By: Darwin Brown

Title: Board Chair

By: _____

Title: _____

Approved as to form:

Regina D. Dineen

NORTH COAST RAILROAD
AUTHORITY

By: Mitch Stog

Title: Exec. Dir.

By: HC Wagner

Title: CHAIR

Approved as to form:

Ch. J. J. J.

**EXHIBIT 1 - CERTAIN DEFINITIONS & CROSS-REFERENCES TO TERMS
DEFINED IN THE AGREEMENT**

"Agreement" shall mean this Operating & Coordination Agreement.

"Applicable Laws" shall mean all federal, state, and local laws, rules, regulations, directives, orders and judgments applicable to the Subject Segments, regardless of scope.

"Changes and/or Additions" shall mean any material improvements (including Pathways) to the Subject Segments constructed after the Execution Date (including but not limited to material additions, betterments and capital projects, for railroad highway grade crossing separations, quiet zones, CTC Signal Systems), and any construction, reconstruction, alteration and modification thereto, and any retirements therefrom, but excluding ordinary maintenance and repair.

"Changeover Date" shall have the meaning set forth in SECTION 4.04.

"Cooperative Agreement" shall mean the Agreement dated April 30, 1996 by and between NWPRA and NCRA.

"CPUC" shall mean California Public Utility Commission or any successor agency.

"CTC Signal Systems" shall mean any signal systems with a bi-directional block signal system under which train movements are authorized by block signal indications with the absolute signals and power switches controlled by the dispatcher from a remote console (including the wayside block signals, power operated switch machines, electronic coded track circuits, relays, and underground cable), including such systems with positive train control.

"Dispatching" shall have the meaning set forth in 49 C.F.R. § 241.5.

"Event of Default" shall have the meaning set forth in SECTION 15.02.

"Execution Date" shall mean the date of execution of this Agreement, as set forth on the first page hereof.

"Final Plans" shall mean design plans for all Changes and/or Additions at the one hundred percent (100%) completion stage, covering all signals and signaling systems.

"FRA" shall mean the Federal Railroad Administration of the United States Department of Transportation or any successor agency.

"Hazardous Materials" shall mean:

- (i) Any substances defined, regulated or listed (directly or by reference) as "hazardous substances," "hazardous materials," "hazardous wastes," "toxic waste," "pollutant" or "toxic substances" or similarly identified as hazardous to human health or the environment, in or pursuant to:

(A) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq.;

(B) the Hazardous Materials Transportation Act, 49 U.S.C. §1802, et seq.;

(C) the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.;

(D) the Clean Water Act, 33 U.S.C. §1251 et seq.;

(E) California Health and Safety Code §§25115-25117, 25249.5, 25249.8, 25281, and 25316;

(F) the Clean Air Act, 42 U.S.C. §7901 et seq.; and

(G) California Water Code §13050;

(ii) any amendments to such enumerated statutes or acts; and

(iii) any other hazardous or toxic substance, material, chemical, waste or pollutant identified as hazardous or toxic or regulated as of the Closing Date under any other applicable federal, state or local environmental laws, including, without limitation, friable asbestos, polychlorinated biphenyls, petroleum (or any fraction thereof), natural gas and synthetic fuel products and byproducts.

"Healdsburg Segment" shall mean that portion of the Northwestern Pacific Railroad Right-of-Way as particularly defined in the JPA Agreement, generally extending from NWP MP 68.22 near Healdsburg, CA to NWP MP 26.96 near Novato, CA, a distance of approximately 41.2 miles; and between MP 26.96 in Novato and MP 25.57 at Ignacio, together with all Track located thereon, except for Industrial Track or stations, track and other facilities constructed exclusively for SMART Commuter Operations.

"Industrial Track" shall have the meaning set forth in SECTION 2.02.

"Initial Design Plans" shall mean all Changes and/or Additions to be constructed on the Shared Track (or any portion thereof) prior to the initiation of SMART Commuter Train Service.

"Invoices" shall have the meaning set forth in SECTION 16.02.

"JPA Agreement" shall mean the Agreement dated May 24, 1995 by and between the Golden Gate Bridge, Highway and Transportation District, the County of Marin, and NCRA.

"Lombard Segment" shall mean that portion of the Northwestern Pacific Railroad Right-of-Way as particularly defined in the JPA Agreement, generally extending from NWP MP 25.6 near Ignacio, CA to Brazos Junction Station in Napa County, CA, at the former Southern Pacific Transportation Company MP 63.4, a distance of approximately 25.3 miles, together with all Track located thereon, except for Industrial Track or stations, track and other facilities constructed exclusively for SMART Commuter Operations.

"Loss" or "Losses" shall mean orders, directives, judgments, causes of action, penalties, fees, claims, costs, liabilities, damages, and expenses (including without limitation court costs and attorneys' fees and all costs of investigating, remediating, or responding to the existence of a claim) of whatsoever nature or source.

"Material Modifications" shall mean a change order issued by the Constructing Party to the approved Final Plans that, in the Constructing Party's reasonable judgment, is material to the overall design and construction of the Changes and/or Additions.

"NCRA" shall mean the North Coast Railroad Authority.

"NCRA Freight Service" shall mean the freight service conducted pursuant to NCRA's perpetual and exclusive easement over the Healdsburg and Lombard Segments and the freight service conducted on the Willits Segment.

"NCRA Passenger Excursion Service" shall have the meaning set forth in SECTION 2.01

"NWPRRA" shall mean the Northwestern Pacific Railroad Authority.

"NWPRCo" shall mean Northwestern Pacific Railroad Company), a California corporation.

"Operating Agreement 1996" shall mean the Agreement dated August 19, 1996, by and between NWPRRA and NCRA.

"Operator" shall have the meaning set forth in ARTICLE III.

"Party" or "Parties" shall mean SMART and NCRA or one of them.

"Pathway(s)" shall mean ancillary bicycle and pedestrian pathways on the Shared Track.

"Principles Agreement" shall mean the Agreement dated April 30, 1996 by and between NWPRRA and NCRA.

"Shared Track" shall mean and include the Healdsburg Segment and that portion of the Willits Segment from Healdsburg to Cloverdale (MP 85.35), and as modified as provided in SECTION 7.01.

"SMART" shall mean the Sonoma-Marín Area Rail Transit District.

"SMART Ancillary Passenger Service" shall mean any SMART passenger service (e.g., intercity or excursion passenger service) other than SMART Commuter Operations.

"SMART Commuter Operations" shall mean regularly scheduled passenger service.

"STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

"Subject Segments" shall mean the Lombard Segment, the Healdsburg Segment and the Willits Segment, collectively, and shall not include Industrial Track.

"Track" shall mean and include all rail and fastenings, switches and frogs complete, ties, ballast and signals and all appurtenances thereto, including without limitation bumpers, roadbed, embankment, bridges, trestles, tunnels, culverts and any other structures or things necessary for support or construction thereof, and, if any portion thereof is located in a thoroughfare, pavement, any crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities, and crossing warning devices.

"Willits Segment" shall mean that portion of the Northwestern Pacific Railroad Right-of-Way as particularly defined in the JPA Agreement, generally extending from NWP MP 142.5 near Outlet Station to NWP MP 68.22 near Healdsburg, CA, a distance of approximately 74.3 miles, together with all Track located thereon, except for Industrial Track or track and facilities constructed exclusively for SMART Commuter Operations.

EXHIBIT 2 - PASSENGER WINDOWS EXAMPLE

Station (Milepost)	AM	PM
Cloverdale (84.7) - Healdsburg (68.0)	6:15 - 7:43*	17:34 - 19:02*
Healdsburg (68.0) - Guerneville Road (55.4)	5:40 - 8:59	16:24 - 19:58
Santa Rosa (53.8) - Petaluma (38.5)	4:42 - 10:00	15:12 - 20:35
Petaluma (38.5) - Ignacio North (25.8) vs (25.57)?	5:16 - 9:31	15:46 - 20:01

Assumes pro-forma passenger timetable of 6-30-10, and ten-minute clearance time by freight trains in advance of scheduled passenger movements.

*In the Cloverdale-Healdsburg segment, freight trains may have access to the mainline during the morning passenger window after passage of the southbound 7:25 AM train from Cloverdale (#113), and during the afternoon passenger window after passage of the northbound 18:44 PM train (#124) from Healdsburg.

During passenger-only windows, where gaps of more than ten minutes may exist between successive passage of passenger trains, and where feasible operationally, short freight movements may be permitted on or across the mainline at the discretion of the SMART dispatcher.

During the midday, at night, and on weekends and holidays, no passenger-only windows are considered necessary under the current operating concept. Passenger and freight trains will be dispatched by SMART with the objective of minimizing or eliminating delays to either passenger or freight trains.

EXHIBIT 3 – SIDING/SPUR CONNECTION PROVISIONS

For the portion of the Shared Track between the Ignacio Wye (MP 25.57) and Santa Rosa Railroad Square (MP 53.8) (or any portion thereof):

1. SMART shall pay the Incremental Cost (as defined below) of a turn-out at the following locations (MPs are approximate):
 - Burdell South (MP 30.5)
 - Burdell North (MP 31.7)
 - Park South (MP 39.2)
 - Park North (MP 39.7)
2. In addition, SMART shall pay the Incremental Cost (as defined below) of a turn-out where NCRA can reasonably demonstrate, on or before January 31, 2014, the presence of a bona fide freight rail customer that requires service from a location requiring such a turn-out (i.e., service from the line where the turn-out would be installed).
3. The foregoing obligation is subject to an absolute maximum of 12 turn-outs.
4. "Incremental Cost" means any cost that would not be required if there were no SMART Commuter Operations.
5. Parties other than SMART shall pay (i) the difference between full cost and Incremental Cost on all tie-ins where SMART is responsible for Incremental Cost (as described above) and (ii) the full cost (including for the more expensive turn-out and for signal system tie-in) of any additional turn-outs regardless of whether such cost includes elements that would not be required if there were no SMART Commuter Operations.
6. To the extent NCRA's commencement of NCRA Freight Service is delayed solely as a result of an injunction, the date set forth above (January 31, 2014) shall be extended; provided that the extension is subject to an absolute maximum of one year.

For the portion of the Shared Track north of Santa Rosa Railroad Square (MP 53.8)(or any portion thereof):

7. SMART shall pay the Incremental Cost (as defined above) of a turn-out where NCRA has a bona fide freight rail customer receiving service by such turn-out on the date that SMART issues for review thirty percent (30%) plans pursuant to SECTION 6.02. Any dispute about the number of such turn-outs shall be submitted to "baseball-style" arbitration pursuant to SECTION 14.02(a).
8. Parties other than SMART shall pay the full cost (including for the more expensive turn-out and for signal system tie-in) of any additional turn-outs, including for any freight rail customers identified after SMART issues for review thirty percent (30%) plans pursuant

to SECTION 6.02 and regardless of whether such cost includes elements that would not be required if there were no SMART Commuter Operations.

EXHIBIT 4 – LIST OF CERTAIN NCRA GRANT AGREEMENTS

[NCRA List provided 6/2/11; SMART needs to review agreements]

EXHIBIT 5 -- CERTAIN RESERVED RIGHTS

SMART reserves all of the following reservations made by NWPR in the Operating Agreement 1996 with respect to the Lombard and Healdsburg Segments:

- ☐ Reservations or exceptions of minerals or mineral rights, and all private and public easements and rights-of-way, however created, for crossings, pipelines, wirelines, fiber optic facilities, roads, streets, highways and other legal purposes;
- ☐ Existing and future building, zoning, subdivision and other applicable federal, state, county, municipal and local laws, ordinances and regulations;
- ☐ Encroachments or other conditions that may be revealed by a survey, title search or inspection;
- ☐ All existing ways, alleys, privileges, rights, appurtenances and servitudes, however created, liens of mortgage or deeds of trust, and
- ☐ The exclusive right to approve or deny any and all future easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the Healdsburg and Lombard Segments, or any portion thereof, so long as such future easements, leases, licenses or rights of occupancy do not unreasonably interfere with NCRA's rail operations.

NCRA shall not make any use of the Healdsburg and Lombard Segments which is inconsistent with SMART's right, title and interest therein and which may cause the right to use and occupy the Healdsburg and Lombard Segments to revert to any party other than SMART.

NCRA reserves all of the following reservations with respect to the Willits Segment:

- ☐ Reservations or exceptions of minerals or mineral rights, and all private and public easements and rights-of-way, however created, for crossings, pipelines, wirelines, fiber optic facilities, roads, streets, highways and other legal purposes;
- ☐ Existing and future building, zoning, subdivision and other applicable federal, state, county, municipal and local laws, ordinances and regulations;
- ☐ Encroachments or other conditions that may be revealed by a survey, title search or inspection;
- ☐ All existing ways, alleys, privileges, rights, appurtenances and servitudes, however created, liens of mortgage or deeds of trust, and
- ☐ The exclusive right to approve or deny any and all future easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the

Willits Segment, or any portion thereof, so long as such future easements, leases, licenses or rights of occupancy do not unreasonably interfere with SMART Commuter Operations.

- SMART shall not make any use of the Willits Segment which is inconsistent with NCRA's right, title and interest therein and which may cause the right to use and occupy the Willits Segment to revert to any party other than NCRA.

EXHIBIT 6 - MAINTENANCE CHARGES

Charge per car mile for cars (loaded or empty) weighing
less than or equal to 263,000 pounds.....\$0.55

Charge per car mile for cars (loaded) weighing
more than 263,000 pounds.....\$0.65

Charge per month for maintenance of
freight-only turns-outs\$200 per freight turn-out